THE

REPORTS

AND

ENTRIES

OF

Sir Edward Lutwyche, Kt.

Serjeant at Law, and late one of the Judges of the Court of Common Pleas.

The ſeveral Caſes therein are truly ſtated upon the reſpective Pleadings and Entries, in *Engliſh*.

ALSO

Every Citation in the Report is carefully examin'd by the Law-Books to which they refer, and where they agree, and where they differ from the Point in Queſtion made appear; and thoſe ranged in that Order as in many Places to form an Argument where there was none before; with large Obſervations.

LIKEWISE

Many obſolete Words and difficult Sentences are explain'd; which are printed in a different Character.

Compoſed in a plain and eaſy Method, and made very uſeful for Students and Practiſers of the *Common Law*.

Pellibus exiguis Volumina magna coegi.

By *W. NELSON* of the Middle-Temple, Eſq;

In the *SAVOY*:

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SIR EDWARD COKE'S
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[illegible]
MYSELVE
BRITANNICVM
Compared in a plain and easy Method, and
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Famine exhaust Volumina magna cocki.
BY R. ANDERSON of the Middle-Temple, Esq;
In the 2 VOL.
Printed by Gre. Bill and R. Robins. Printers to the Hon. Soci-
ety of Gray's-Inn, Esq; and J. Bonwicke at the Rose in St.
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House in Ave-Mary-Lane. MDCCXIII.

THE PREFACE.

TO tranſlate the Works of another, with Corrections, without giving ſome Reaſon for it, would be an improper Addreſs to the Living, as well as a Reproach to the Dead; whereas if the Truth were fairly told, the Memory of the one would be vindicated, and the Profit of the other would be encreaſed.

The learned Serjeant, the Author of the following Books, had too great a Reputation in the Law to ſuffer any more by finding Fault with him, than (the common Fate of the beſt Writers,) ſome particular Errors, which none are free from. The large Teſtimonials of his Abilities prefixed to this Work leave no room to doubt of his Power of informing and obliging his Countrymen, as a moſt excellent Lawyer. But yet his Method was not ſo very exact and uſeful as I hope it is now made.

The beſt way of Improvement in the Study of the Law, I believe will be allowed to be a Publication of the Pleadings and Arguments on both Sides, and the Reſolutions of the Court upon them: This enlarging the Proſpect of the Reader, teaching him to make proper Reflections on the whole, and very often to ſtart Hints from the minuteſt Obſervations, which may be of the greateſt Conſequence to others, as well as Advantage to himſelf.

It is for this Reaſon that Mr. *Plowden*'s *Commentaries* and my Lord *Coke*'s Reports are in ſo great Eſteem with the

Judicious, they having taken the Courſe now generally allowed to be the moſt proper, certain, and inſtructive. On the contrary, in many other Books, the Pleadings are ſo long and tedious, that the Caſe is loſt in the Preface to it, and then the Report is ſo very ſhort that it can be of little Uſe; where we are only told the Plaintiffs and Defendants Names, the Authorities cited by the Counſel, and ſo the Diſpute is ended, without aſcertaining what thoſe Authorities are, or whether juſtly quoted or no.

Thus it has happened with our Author, who amaſſes a Number of Citations, in which it is plain his Memory or Diligence fail'd; many of them being wrongly referred to their Authors, which is no Accuſation of the Serjeant, ſince in a Multiplicity of Buſineſs he could not help truſting ſometimes to the Hands of others.

To remedy this Defect, Care has been taken in this Tranſlation to examine every Citation with the Book, from which it is cited, to correct it when falſe, to illuſtrate it when doubtful, and methodize the whole in an intelligible eaſy Order. If now and then there is a new Argument formed from an imperfect one in the Original, the Reader I hope will take it as an Endeavour to ſerve him, and no Reflection on the Serjeant.

Beſides this, there are many difficult Sentences, and obſolete Terms explained, which with the Remarks are printed in a different Character, ſo that theſe Volumes are now ſo compleat as to anſwer the End the Author intended, which is the Advantage of the Reader.

I have no View of depreciating the Memory of the Dead, or exalting my own; but (upon the Advice of eminent Lawyers,) to make the learned Serjeant's Works more uſeful to the Students and Practiſers of the Law.

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Abate,

Abatement.

Smalwood & al. versus *Eveſque de Coventry*, &c. & al'.

Intrat. Paſch. 31 Eliz. Rot. 349.

QUARE impedit brought by the Executors of William Sale, to preſent to the Archdeaconry of Derby, wherein the Plaintiffs declare, That Tho. Beauchamp, late Biſhop of Coventry, being ſeiſed of the ſaid Archdeaconry in Right of his Biſhoprick, did confer the ſame on Luke Gilpin; that after the Death of that Biſhop, the Defendant was conſecrated Biſhop of that See, and by vertue thereof, was ſeiſed of the Archdeaconry, &c. and granted the Right of Patronage, &c. to John Becon, for twenty one Years; that Becon aſſigned his Intereſt to the Plaintiff's Teſtator, in whoſe Life-time the Archdeaconry became void by the Death of Gilpin; that William Sale made his Will, and conſtituted the Plaintiffs Executors thereof, who ought to preſent, &c. that the Defendants diſturbed the Teſtator Sale in his Life-time in nunc retardationem executionis teſtamenti, &c.

The Defendants craved Oyer of the Writ, which was ſet forth in hæc verba; then they plead in Abatement that there is not any Precedent in the Regiſter of a Quare impedit brought by an Executor, for a Diſturbance done to his Teſtator; that by the Writ it appeared the Archdeaconry was vacant, ſo that the Executors might have brought a Quare impedit for a Diſturbance done to themſelves after the Death of their Teſtator; that the Diſturbance is alledged to be in his Life-time in nunc retardationem executionis teſtamenti, which is impoſſible.

There was a Demurrer and a Joinder in Demurrer.

The Serjeant tells us, This Caſe is ſupported by Sir *John Savil*, and that the Record was now printed to correct a Miſtake in that Report, where 'tis ſaid there were two Diſturbances alledged, *viz.* one in the Life-Time of the Teſtator, and another in the Time of his Executors, when in Truth by the Pleadings, there is but one Diſturbance ſet forth, and that is whilſt the Teſtator was living. *Savil* 94.

But certainly this could not be any Reaſon for publiſhing this Record, for after 115 Years, when this Caſe happened, it cannot be material to inform the World that there was but one Diſturbance ſet forth in that Declaration; there muſt be ſome other Reaſon for it; and probably it was to acquaint the Reader (to uſe the common expreſſion) how long the *Lutwyches* have followed the Law; for I find *John Lutwyche* was Attorney upon Record for the Defendants, and ſo he was in 9 *Jac. Winch, Ent. fol.* 9.

I muſt needs ſay that the Serjeant has not kept very cloſe to his Word in the firſt Caſe of the Book, *viz.* in avoiding an impertinent Prolixity; for if one ſhould now print the Records of ſuch Caſes, which have beenreported by Juſtice *Croke* and others above one hundred Years ſince, there muſt be but few Lawyers able to buy ſo many Volumes, and very few the wiſer for them when bought.

9 *Gawen* verſus *Surby*, Trin. 35 Car. 2. Rot. 1528.

IN Aſſault and Battery, the Defendant imparled ſpecially, viz. by ſaying, Salvis ſibi omnibus & omnimodis exceptionibus ad billam & habuit licentiam interloquendi; and then venit & defendit vim & injuriam quando, &c. and afterwards pleaded an Outlawry in Abatement, and upon Demurrer he was ruled to anſwer over, becauſe ſuch a Plea is never allowed after a Special Imparlance and full Defence.

Now this depends upon the Adverb *Quando*; for if that Word implies all the reſt, *viz. ubi & quomodo Curiæ videbitur, &c.* then the Defence is full, and I think it was never yet doubted, but that the Words *venit & defendit vim & injuriam quando, &c.* made a full Defence.

Hardr. 365.

'Tis true, in *Hardres's Reports* the Court held it to be otherwiſe; the Queſtion there was, That when the Defendant had appeared & *venit & defendit vim & injuriam quando, &c.* and imparled ſpecially by ſaying, *Salvis ſibi omnibus exceptionibus, &c.* whether after ſuch an Imparlance he might plead his Privilege as Marſhal of the King's Bench, in Abatement of the Action? And it was held he might, becauſe it was not a full Defence; but certainly there muſt be a Miſtake.

Style 273.

There is a Caſe in *Style*, where it was held that ancient Demeſn could not be pleaded after an Imparlance and a full Defence, by theſe Words, *venit & defendit vim & injuriam quando*, but it doth not appear by the Book, whether the Imparlance was General or Special.

The Serjeant hath cited many Precedents out of the Books of Entries, but I can find only two of them which are pertinent to this Caſe.

Ff. In an Action of Debt for the Arrears of an Annuity, issuing out of Lands in *Pottersball*, &c. the Defendant *venit & defendit vim & injuriam quando*, &c. and after Oyer of the Grant imparled specially, and then pleaded in Abatement, That there was no such Vill as *Pottersball*; which is this very Case. *Co. Entr.* 121. *Aston* 389

But all the other Precedents cited, differ from this Case: As where the Hundred was sued for a Robbery, the Defendants *per Attornatum ven. & defendunt vim & injuriam quando, &c. & quicquid*, and then plead the General Issue. *Co. Ent.* 348. *b.* 349. *b.*

So in a *Cui in vita*, the Defendant *venit & defend' jus suum*; and imparled specially, but there is no Plea. *Co. Ent.* 118, 565.

In all the Precedents cited out of *Rastal*, after a full Defence, the Defendants pleaded in Abatement; but there is no Imparlance in either of them, and in some there is no Plea, and in others, where there is a Plea, there is no Imparlance. *Rast. Ent.* 287, 333, 334, 368. 605, 663.

Walford versus *Savil.*

Cooke. Mich. 36 Car. 2. Rot. 302.

Essex ss. DEBT against an Administratrix, the Defendant venit and craved Oyer of the Writ, the Teste whereof was on the 19th Day of February, and then she pleaded in Abatement, That her Husband died intestate primo Febr. and that the Commissary of the Bishop of London, legitime constitutus, granted Administration to her on the 20th Day of February, and not before; so that the Writ was brought against her before Administration granted.

To this Plea the Plaintiff demurred specially, and shewed three Causes.

1. That the Defendant had made no Defence, for 'tis said, that venit only.

But this was over-ruled, because there are many Precedents where no other Defence is made.

The Serjeant has not mentioned where any of those Precedents are to be found; but if he had, he doth not approve this way of Pleading, for he tells us the safest way is to make the Defence thus, viz. ven. & defend. vim & injuriam, without saying any more.

2. Another Cause of Demurrer was, That the Defendant did not shew what Authority the Commissary had to grant Administration.

Neither is it necessary so to do, especially having shewed that he was a Commissary of a Bishop, legitime constitutus, for that is as well as if it had been granted by the Bishop himself; and therefore where the Plaintiff shewed that Administration was committed to him by the Official of such a Bishop, this was held good without saying 2 Mod. 65.

saying loci illius ordinarius; but if it had been in the Case of a Peculiar Jurisdiction, then you must shew what Authority they have.

Rast. Entr. 324. b. placito 2.

3. The third Cause of Demurrer was, That the Defendant did not produce the Letters of Administration by a Profert hic in Curia.

This was answered out of a Precedent in Rastal, where an Executor pleaded that C. died intestate, and that the Bishop of Salisbury, loci illius ordinarius, granted Administration to him; without setting forth & profert hic in Curia.

The Serjeant tells us, That the Plea in the principal Case was held good; which was a Mistake, and not discovered by him till after it was printed; for in the 2d Volume, Fol. 1667, he tells us, That there was a Rule entered in the Court-Book, That the Defendant should answer over; and that there was no Rule in his Book to the contrary: What he means by that is not easily to be apprehended.

Anonynius.

ff. MISNOSMER in the Christian Name was pleaded in Abatement, viz. The Defendant pleaded that he is called William Robins, and was always known by that Name, and traversed that he was called or known by the Name of Robert Robins.

Rast. Ent. 108. *plac.* 5. *Aston.* 1. *Bro. Misnos.* 8.

The Serjeant reports that this Plea is warranted by a Precedent in *Rastal*. I have looked into the Books cited in the Margent, and I find them to be agreeable to this Plea; only 'tis thus pleaded, *viz. & prædt* the Defendant *in propria persona sua, &c. dicit*; and tis very probable those Books might occasion the first *Nota* which the Serjeant made on this Plea, viz. Nota, that the Word prædict. is well omitted in the beginning of the Plea; for if the Defendant being sued by the Name of William, when his Name is Robert, had pleaded & prædict' Will'us, &c. this had affirmed his Name to be agreeable with the Writ.

Keilway 93. *b.*

So is *Keilway*, where 'tis said, If the Defendant is sued by the Name of *W. G.* and he imparles and says, That *prædict' W. G. petit diem interloquendi*, by this he had affirmed that his Name was *W. G.* and shall not afterwards plead that his Name is *J. G.*

Br. Estoppel 79. 19 *H.* 6. 1. 1 *Ed.* 4. 3.

And so is the Year-Book of *H.* 6. where 'tis said, That nothing concludes so strongly as a Record to which one is a Party; and therefore where an Action of Trespass was brought against *W. C.* and he makes his Defence by that Name, he thereby affirms himself to be the same Person.

But in the Year-Book 34 *H.* 6. 31. there is nothing to this purpose.

Style 440.

And as to the Case of *Boyle* and *Scarborough*, it was thus, *ff.* The Defendant was sued by the Name of *Robert Boyle Esq*; he pleaded the Statute of Limitations; the Plaintiff replied, That he

filed an Original againſt the Defendant within ſix Years, and outlawed him by that Name.

The Defendant, *proteſtando* That there was no ſuch Original, for Plea ſaid, That he was a *Knight*, &c.

The Plaintiff replied, That the Defendant reverſed the Outlawry by the Name of *Robert Boyle Eſq*; and upon Demurrer he had Judgment, becauſe the Defendant coming in *gratis* by that Name to reverſe the Outlawry, he is eſtopped to ſay, That he was a *Knight*, eſpecially ſince he pleaded thus, viz. *& prædict' Robertus Boyle*, which affirms him to be the ſame Perſon againſt whom the Original was brought.

But where the Miſnoſmer is in the *Surname*, certainly the Defendant may begin his Plea thus, viz. *& prædict' Will'us Robins*, though his Name is *Roberts*; for 'tis not an Affirmance that he is the ſame Perſon; and therefore thoſe are not ill Precedents where 'tis ſo pleaded: I rather take thoſe to be very ill Pleas, which the Serjeant had ſeen, (but he doth not ſay where) in which 'tis alledged, that the Defendant is *eadem perſona* againſt whom the Writ is brought, and this after a Miſnoſmer pleaded in the Chriſtian Name; becauſe 'tis not only contrary to the Precedents, but a very unuſual Thing, and not allowed by Law, for a Man to have two Chriſtian Names.

2. 'Tis obſerved that this Plea is *in propria perſona*, and not *per Attornatum*; the Reaſon may be, becauſe the Warrant of Attorney muſt expreſs the Names of both Parties, as 'tis in the Pleadings, and the Entry is thus, ff. A. B. *ponit loco ſuo* M. B. *attornatum ſuum verſus* W. R. *in placito, &c.* So that if either of thoſe Names are wrong, the Miſnoſmer muſt not be pleaded by Attorney, becauſe the Entry of the Warrant of Attorney affirms, they had ſuch Names as in the Pleadings.

3. In the next Place the Serjeant obſerves a difference between the Plea of a Defendant when he is brought in by *Cepi*, and when he appears *Gratis*: That in the principal Caſe he was brought in by Proviſo, and in ſuch Caſe this is a proper Plea, but where he comes in *gratis*, the Form is thus, ff. *& W. R. de & in propria perſona ſua ven. & dicit quod ipſe eſt eadem perſona verſus quam prædict'* (the Plaintiff) *tulit breve ſuum prædict' per nomen* R. R. *&c. & defendit vim & injuriam, &c.*

The laſt Thing obſerved is, That 'tis not ſaid *petit judicium de brevi* in the beginning of the Plea, but only in the concluding Part, neither is it Informal for that Reaſon; for thoſe Words are never put in the beginning of a Plea in Abatement, unleſs there is an apparent Fault in the Writ it ſelf.

But after all it doth not appear when this Plea was pleaded, nor in what Court, nor where to be found; ſo that it may be only a fancied Plea on purpoſe for the Serjeant to make his Obſervations on it.

Anonymus.

ff. IN Dower, the Defendant pleaded as to part of the Demand, that he was sole seised for Life, and traversed that the Tenant had any Thing in the Lands, and concludes this part of his Plea thus, viz. & hoc paratus est verificare *& petit judicium de brevi*, and vouches to Warranty one Peter Johnson, and as to the Residue, he pleads, That the Demandant ought not to be endowed, for that her Husband was not seised thereof at the Time of his Marriage, or at any Time afterwards, and so concludes to the Countrey.

The Serjeant hath made a *Quere* upon this Plea, Whether the Tenant ought to demand *Judgment of the Writ?* and refers his Reader to *Rastal*, and if the Precedent there is of any Authority, the Doubt is resolved in the Affirmative; it was thus:

Rast. Ent. 364. *plac.* 11.

ff. A *Formedon in descender* was brought against seven; four of them made Default, the other three appeared; and one of them pleaded, That he was sole seised of a Freehold, *&c.* for Life, and traversed that the other two had any Thing therein, *& hoc, &c. & petit judicium de brevi*; which is this very Case.

There is another *Note*, That the Tenant ought to plead over in Bar or to vouch; which is true, but then he ought not to conclude to the * Writ.

* *Thelval* 144. *plac.* 20.

This is another fancied Plea, for the Serjeant doth not mention when it was pleaded, in what Court, or where to be found.

Marshal versus *Burnet.*

Belvin. Hill. 1 & 2 Jac. II. Rot. 1244.

Yorksh. ff. AN Action on the Case was brought against an Executrix for Barley sold to her Testator at Bradford, in Consideration whereof, he in his Life-time at Bradford promised to pay, *&c.*

The Defendant craved Oyer of the Original Writ, which was thus, Si, *&c.* tunc pone Gratian Burnet nuper de Otteley, and it was Teste Sexto Novembris. Jac. and then she pleaded in Abatement, That her Husband was living after that Day, viz. apud Otteley præd', which is wrong, because this being a transitory Action, and the Promise being alledged to be made at Bradford, the Visne must arise from thence.

Bro. Lieu. 9. 6 H. 7. 5, 6. Dyer 17. a.

Now there being a necessity of alledging a Place where the Testator was living after the Teste of the Writ, the Defendant ought not to say, it was at Otteley, but should have pursued the Declaration, and alledged it to be at Bradford; for Otteley was only the Place of her Abode; and if this Pleading should be allowed, then it would follow that the Visne would be drawn from the Place alledged

in

in the Declaration, which is never ſuffered in a tranſitory Action, and therefore this Plea was held ill.

The Serjeant hath made two *Nota's* and one *Quære* on this Caſe.

The firſt *Nota* is, That there are ſome Precedents where the Death of a Man is alledged by the Plaintiff, and the very ſame Man is averred by the Defendant to be living, without ſhewing in what Place; but he doth not tell us where thoſe Precedents are to be found; however, we have his Opinion that they are not good.

The next Obſervation is, That by this Writ and Declaration the Perſon is only *implied* to be dead, for the Action is brought againſt an Executrix, and 'tis alledged that her Husband *in his Life-Time* promiſed to pay, *&c.* which implies that he was dead at the Time of this Action brought; and in ſuch Caſe his Death ought not to be traverſed, becauſe 'tis not poſitively alledged that he was dead; and therefore the Defendant had done right not to traverſe the Death.

But when the Death of a Man is directly affirmed by the Plaintiff, and the ſame Man is alledged by the Defendant to be living, he muſt then traverſe his Death, or elſe his Plea will be naught; becauſe thoſe are both Affirmatives, upon which no Iſſue can be taken without a Traverſe. 19 *H.* 6. 11. 39 *H.* 6. 49. 1 *Vent.* 213.

The Serjeant hath made a *Quære*, Whether the Defendant ſhould have pleaded that the Teſtator was *living*, *die impetrationis brevis originalis?* And he tells us he can find but one Precedent to that purpoſe in all his Books, which ſtanding ſingly by its ſelf he doth not ſeem to relie on; for he tells us, Pleas in Abatement ought to be very exact, which this Plea was not, becauſe the Allegation, That the Teſtator was alive after the *Teſte* of the Original, was only *Argumentative* that he was dead at the Time of the Writ purchaſed; but I rather think 'tis a very good Argument that he was then living; for 'tis impoſſible that a dead Man ſhould revive before the General Reſurrection, without a Miracle! *Hern's Pleader.* 1.

Papworth verſus *Stacy.*

Winford. Trin. 2 Jac. II. Rot. 2076.

Cambridge ſſ. IN An Action of Debt againſt an Executrix, the Plaintiff declared on a Bond, wherein the Teſtator became bound to pay 35 l. 8 s. 5 d. at or upon the firſt Day of *May*, 2 *Jac.* 2.

The Defendant craved Oyer of the Original Writ, which was Teſte 27°. Aprilis, in the ſame Year, and then pleads in Abatement, that the Teſtator was living on that Day; but he did not aver her Plea thus, viz. & hoc parata eſt verificare, unde petit judicium, &c.

This was held to be only matter of Form, of which no Advantage could be taken upon a * General Demurrer; and a Caſe in Savil was cited to prove it, which was thus. * 'Tis otherwiſe upon a Special Demurrer. 1 Lut. 21.

Savile 85. *ſſ.* In a *Formedon in Deſcender* the Tenant pleaded a Fine, &c. and upon a Demurrer this Exception was taken to the Plea. *ſſ.* That the Defendant had concluded it, *prout patet per finem remanen. de recordo*, when it ſhould be, *prout per finem & Proclamationem, &c. patet*; This was held to be only Form, and not Subſtance, and that the Plea had been good if the whole Sentence had been omitted.

1 *Inſt.* 303. *b.* If this is true, then why doth my Lord *Coke* tell us that every Plea ought to have a proper Concluſion; that *ordine placitandi ſervato, ſervatur & jus*; that if that Order is inverted, great Prejudice may happen to the Party. Now if *hoc paratus eſt verificare*, is a proper Concluſion to a Plea in Abatement or in Bar, then why ſhould that or any other proper Concluſion be omitted, and yet the Plea be good? For Forms and Order in Pleading ſeem to be as eſſential as Matter it ſelf, and 'tis ſo allowed upon Special Demurrers, and aſſigning want of Forms for Cauſe.

But in the principal Caſe the Judgment was quod breve caſſetur, becauſe it was Teſte before the Money became due on the Bond.

Bradley verſus *Glynne*.

Trin. 2 Jac. II. Rot. 341.

Middleſex ſſ. IN Debt on a Bond, the Defendant pleaded in Abatement, That the Plaintiff was excommunicated for Alimony, and ſets forth the Capias, and averred his Plea, & petit judicium, &c. averred the Identity of the Perſon, &c.

And upon Demurrer this Plea was held ill.

1. Becauſe the Defendant had not ſet forth any Certificate of the Excommunication from the Judges Delegates.

Littl. Sect. 201. For *Littleton* expreſly affirms, That the Defendant muſt ſet forth the Certificate under Seal, witneſſing the Excommunication, and then pray Judgment, *ſi reſpondere debeat.*

2. The Plea ſhould have been concluded thus; *ſuper quo* (the Defendant) *petit quod loquela præd' remaneat ſine die*, and not *petit judicium de breve*; becauſe admitting the Plea to be true, the Writ is not abated; for the Plaintiff may be abſolved from the Excommunication, and have a Re-attachment upon the ſame Original, and therefore upon ſuch a Plea the Judgment is, *quod eat inde ſine die.*

Co. Litt. 128. 3 *Lev.* 333. 3. The Excommunication is not pleaded *ſub pede ſigilli*, and it muſt be ſo pleaded, unleſs the Writ had iſſued out of the ſame Court in which the Excommunication was pleaded; for the pleading a Record in one Court which remains as a Record in another Court, is accounted dilatory, and not to be allowed, unleſs *ſub pede ſigilli.*

Little versus *Plant*.

Mich. 2 Jac. II. Rot. 767.

Northampton ss. DEBT against an Administratrix, she pleaded in Abatement, That a Will was made, and an Infant was constituted Executor, and that Administration was granted to her during the Minority of the said Executor, unde ex quo the Plaintiff did not sue the Defendant as Administratrix durante minori ætate, *petit judicium de brevi, &c.*

The Plaintiff demurred Specially, and shewed for Cause that the Defendant had not concluded her Plea well for want of an Averment, & hoc paratus est verificare; and this was held a good Exception.

Tartelot versus *Burton*.

Cooke.

Pas. 3 Jac. II. Rot. 475.

London ss. INDEBITATUS assumpsit for Goods sold; the Defendant imparled Generally, and then pleaded in Abatement, that before the Action brought she was married, and that her Husband was living, and because he is not named, petit judicium si ipsa ad actionem præd' respondere debeat.

The Plaintiff replied, That he declared in this Action against the Defendant, &c. and that she Imparled Generally, and for that a Plea in Abatement is not to be allowed after such an Imparlance, he demurred to this Plea.

The Defendant joined in Demurrer, and the Judgment was, That she should answer over, because a Plea in Abatement is not good after a General Imparlance.

Naers versus *Comitem Huntingdon*.

Mich. 4 Jac. II. Rot. 313.

Midd. ss. SCI. FA. upon a Recognizance for 1000 l. returnable Craft. animarum, and upon two Nichils returned the Plaintiff prays Execution, &c. for the said 1000 l. per ipsum *Recogn'* juxta formam Recuperationis præd'.

The Defendants pleaded in Abatement, That the Sci. fa. was Teste 23 Octobris, and returnable Craft' animarum, which is the 3d Day of November; so that there was not fifteen Days between the Teste and Return; and upon Demurrer it was held to be good enough, for by the Statute 17 Car. 1. 'tis Enacted, That Writs and Processes in personal Actions, and having Day from *Tres Mich.* to *Craft. animarum* shall be good, though there are not fifteen Days between 17 Car. 1. cap. 6. Paragraph 8.

the 4° *die* of the ſaid *Tres Mich.* and the Days of *Eſſoins* of *Craſtino Animarum.*

But then it was objected againſt the Sci. fa. That Execution was prayed of the Money per ipſum *Recogn'* juxta formam Recuperationis, when it ſhould be *Recognitionis.* Now the firſt part of the Sentence being right, viz. to have execution of the Money *Recogn'*, the ſubſequent Words, viz. ſecundum formam *recuperationis* prædict' ſhall be repugnant, contradictory and void.

Young verſus *Caſe.*

Cooke. Trin. 2 Will. & Mar.

Norf. If. CASE againſt an Executrix for Goods ſold to the Teſtator; the Defendant pleaded in Abatement, That her Husband died Inteſtate, (but did not ſay in what Dioceſe) and that he had Bona notabilia in ſeveral Dioceſes, (but did not ſay in which) and that the Dean and Chapter of Canterbury (upon the Suſpenſion of the Archbiſhop) granted Adminiſtration to her, ſo that ſhe ſhould be ſued as Adminiſtratrix, and not as Executrix; and avers her Plea, & petit judicium de Brevi.

The Plaintiff demurred Specially, and for Cauſe ſhewed, That the Defendant had pleaded that Adminiſtration was granted to her without a Profert hic in Curia.

1. The firſt Exception taken to the Plea is, That 'tis not alledged in what Dioceſe the Husband died Inteſtate, or where he had bona notabilia, ſo that it might appear to be within the Province of Canterbury; for otherwiſe the Adminiſtration is not well granted to her; and this was held to be a good Exception.

2. Notwithſtanding all the Matter alledged in the Plea, the Defendant might poſſeſs her ſelf of the Goods as Executrix de ſon tort before this Adminiſtration was granted to her; and if ſo, then the ſubſequent Adminiſtration ſhall not purge the former wrong.

And to prove this Read's Caſe was cited.

5 Rep. 33. b. Style 384.

Sſ. It was a Special Verdict in Debt againſt *an Executor de ſon tort*, in which it was reſolved, that a *Stranger* taking Goods into his Poſſeſſion before an Adminiſtration granted, may be charged as an *Executor de ſon tort*; but then the Plaintiff in his Replication ought to alledge him to be ſo, and ſo is *Hob.* 49. which was Debt by an Executor, againſt an Executor of *W. K.* The Defendant pleaded that *W. K.* died Inteſtate, and that Adminiſtration of his Goods was granted to another.

The Plaintiff replied, That before that Adminiſtration was granted, the Defendant poſſeſſed himſelf of ſeveral of the Inteſtate's Goods, which he as Executor to *W. K. in uſum ſuum proprium convertit*; and it was held that the Plaintiff had a good Action againſt this *Executor de ſon tort* before Adminiſtration granted, which ſhall not be taken away by a ſubſequent Grant thereof, though lawfully granted.

At the end of this Case the Serjeant hath added a *Nota* of his own, which is, That the Defendant hath set forth in her Plea, that it belonged to the Dean and Chapter, *&c.* to grant Administration: Now I would fain know to whom else it could belong *sede vacante*? and as to this purpose the Plea is as full as it can be expressed, for it alledgeth, that all Ecclesiastical Jurisdiction which the Archbishop had *sede plena*, did then belong to the Dean and Chapter, *&c. ratione suspensionis reverendi patris, &c.*

Bowler versus *Spatchurst.*

Cooke. Pas. 8 W. III.

Midd. ff. IN a Writ of Privilege by an Attorney, he declared on a quantum meruit for his Labour and Pains in solliciting his Client's Suits, and laid the Promise to pay the Money in the Parish of St. Clement's Danes, in the County of Middlesex.

The Defendant pleaded in Abatement, That the Plaintiff prosecuted another Writ against him for the same Cause of Action directed, to the Sheriff of Wilts, which was still in Force, and averred his Plea, & petit judicium de isto posteriori brevi.

The Plaintiff in his Replication confessed the Writ into Wiltshire, but avers that nothing was done upon it, and that afterwards he brought an Attachment of Privilege directed to the Sheriff of Hampshire, to which the Defendant appeared, and the Plaintiff declared against him; and he likewise averred the Replication, & petit judicium, and that the Defendant respondeat to the last Writ; and upon Demurrer the Defendant had Judgment, because the Action being laid in Middlesex, it must be intended that it was founded on a Writ directed to the Sheriff of that County; but the Plaintiff in his Replication alledging that the Appearance was to a Writ directed to the Sheriff of Hampshire, he had by his own shewing falsified his Writ, and therefore it was abated.

There is no Book-Case cited by the Serjeant, which is a sure way to prevent Mistakes.

Wells versus *Williams.*

Mich. 9 W. III.

THIS was an Action of Debt brought by the Plaintiff, as Executrix of W. upon a Bond made to him.

The Defendant pleaded in Bar that W. was an Alien, born in France, &c. and came hither without the King's Licence.

The Plaintiff replies, That W. from the Time of the making of the Bond to the Time of his Death continued in England, with the Leave, and under the Protection of the King, & petit judicium per quod (the Defendant) ad breve & narrationem respondeat.

And

And upon a General Demurrer the Judgment was, That the Defendant ſhould anſwer over, becauſe it did not appear by this Plea but that the Teſtator W. might come into England in time of Peace, and continue here for a while, which amounts to a Licence; or he might come in Time of War, and remain here without Diſturbance, and then it ſhall be preſumed that he had the King's Leave to come hither.

The Serjeant hath cited ſome Books which I have peruſed; the firſt is *Moor*, 839. and *Benloe*, 10. but this muſt be a Miſtake, for there is nothing in either of thoſe Authors relating to this Matter.

The next is *Dyer*, 2. *B.* which is very little to the purpoſe, for 'tis no more than this, *viz.* That an Alien may have a perſonal Action againſt an *Engliſhman*, if there is no War between the two Princes; for then he is an Enemy, and ſhall not have the Benefit of the Law, which implies, that in Time of War he cannot have ſuch an Action; and this Plea was pleaded in Time of War.

And now the Serjeant according to his uſual Cuſtom, adds a *Nota* of his own, which is, That this Plea began in Bar, and the Replication concluded in Abatement, *viz. quod præd'* the Defendant *ad narrationem reſpondeat.*

As to this Matter the Reader is to obſerve, That every Plea is either in Bar to the Action, and then it begins thus, *viz.* the Defendant *dicit quod* (the Plaintiff) *actionem, &c. habere non debet*; and then the Plaintiff replies, *quod præcludi non debet, &c.* and may conclude ſometimes to the *Countrey*, and ſometimes after this manner: If 'tis an Action on the Caſe, then he may ſay, *& hoc parat. eſt verificare, unde petit judicium & damna ſua occaſione præmiſſorum ſibi adjudicari.*

If 'tis in Debt, then he concludes his Replication thus, *viz. unde petit judicium & debitum ſuum præd' una cum damnis ſuis occaſione detentionis debiti illius ſibi adjudicari.*

Now if the Plea is not in *Bar* to the Action, then it muſt be in *Abatement* to the Writ upon which the Action is grounded; and then it uſually begins thus, *viz. petit judicium de brevi*, and ends with the like Words; *& quod breve præd' caſſetur.*

If the Action is brought by Bill, then the Plea in Abatement begins thus, *viz.* That the Defendant *ad actionem* of the Plaintiff *reſpondere compelli non debet*; and concludes, *unde petit judicium* if he ought to be compelled to anſwer.

Then the Plaintiff may reply and ſet forth the Special Matter, and conclude his Replication with an Averment, *&c. unde petit judicium & quod præd'* (the Defendant) *ad breve ſuum reſpondeat.*

But 'tis not always neceſſary to keep exactly to theſe Forms, for if the Plea is in Bar, viz. *Action' non, &c.* the Replication may be *caſſari non*, which is the Form in Abatement, and yet it ſhall be good.

The Serjeant hath cited ſome Entries which do not come up to the Caſe.

As *Raſtal*, Tit. *Ejectment*, *fol.* 7. and *Aſton*, *fol.* 11. where the Defendant pleaded in Abatement that the Plaintiff was an Alien; and the Plaintiff in his Replication concluded to the Countrey, which is very common after a Plea in Abatement. So in *Raſtal*,

605. *B.* the Defendant began his Plea in Bar to an Action of Treſpaſs, and the Plaintiff concluded his Replication, *unde petit judicium & damna ſua occaſione tranſgreſſionis*; which is right, and as formal as it ought to be, and therefore I cannot imagine why the Serjeant cited that Book.

And all that is ſaid in *Littleton, ſect.* 198. is, That if an Alien will bring an Action, the Defendant may plead in Abatement, that the Plaintiff was born out of the Allegiance of the King, *&c.* and my Lord *Coke*, in his *Comment* upon it, tells us, This muſt be underſtood of an *Alien in League*; for if he is an *Alien Enemy*, then the Defendant may plead it in *Bar* to the Action, which is not at all to this purpoſe.

Then *Bagott's* Caſe was cited, which was an Aſſize brought by him, and one *Swirenden* for the Office of the Clerk of the Crown in Chancery. 9 Ed. 4. 7.

The Defendant pleaded in *Abatement* as to *Bagot*, that he was an Alien, and averred his Plea, and *petit judicium de brevi*; and as to *Swirenden*, he pleaded that he was never ſeiſed of the Office, *&c.*

The Plaintiff *Bagot* replied, That he was made a *Denizen* by *H. 6.* and ſets forth the Letters Patents, and concludes thus, *unde petit judicium & quod procedatur* (between him and the Plaintiff) *ad captionem aſſize*; which is no more than a Concluſion to the Countrey, and which is ſo very uſual after a Plea in Abatement.

Shovel Mil. verſus *Evance & Hayter.*

Coke. Mich. 9 W. III.

Lond. ff. INDEBITATUS aſſumpſit againſt two Defendants, one of them was outlawed.

And the other pleads a Miſnoſmer in his Companion who was outlawed, viz. that there are in London, two Whitfeild Hayters, and both Goldſmiths, and that the Whitfeild Hayter named in the Writ, was the Junior of the two, and ſo avers his Plea; unde ex quo it doth not appear by the Writ againſt which of them it was brought, the Defendant petit judicium de brevi illo; and upon Demurrer the Judgment was, That the Defendant ſhould anſwer over, becauſe he ought not to plead a Miſnoſmer in his Companion; for that ought to be pleaded by the Party himſelf who was miſnamed. Bro. Miſnoſ. 10, 69.

The Serjeant hath cited *Brook Miſnoſmer*, 79. which is a Miſtake, for 'tis 69. and 'tis an Abridgment of the Year-Book 14 *H.* 6. 13.

Moseley versus *Coldwell.*

Winford. Mich. 10 W. III. Ro. 255. in C. B.

Yorksh. IN a Formedon in Descender

The Tenant pleaded Non-tenure as to part, Et petit judicium de brevi as to that part.

And as to the Residue he pleaded an Entry thereinto by the Demandant.

The Plaintiff replied as to the Non-tenure, that the Defendant was Tenant of part of the Land in demand, and as to the Entry he demurred.

This Plea consisted of two Parts, *viz.*

1. That the Defendant was not Tenant of part of the Land.

2. That the Demandant entered on the other part.

Now the Serjeant, who was Counsel for the Demandant, objected, That the Plea taken altogether was inconsistent, Because the Defendant had alledged that he was not Tenant of one part of the Land, which being a Negative, implies that he was Tenant of the other part; and that had is immediately contradicted by the subsequent Paragraph, where he sets forth, that the Demandant entered into the other part; for if that is true, then the Defendant could not be Tenant of it.

I must confess this is a formal Objection raised upon a very nice Implication; but because it was not regarded by the Court, I shall take no farther notice of it.

2. Then he tells us, That the Plea is repugnant, because in the first Part of it the Tenant would have the Writ abate as to part for Non-tenure, and afterwards he would have the whole abated by Entry; for so is the Law, viz. if he enter into part, the Writ must abate for the whole.

But this is by Implication of Law, (which is much stronger than the Implication made before by the Serjeant) for the Defendant doth not pray that the Writ may be abated *wholly* for Entry, but only *quoad residuum*: 'Tis true, the Law says, That the Entry into part hath falsified the whole Writ, and to prove it some Year Books are cited, as 26 *H.* 6. 81. but I can find no such Year in Folio. The next is 5 *Ed.* 4. 116, 117. neither can I find any such Folio's in that Year Book.

5 *H.* 7. 7.

Br. Brief. 20.

3. Another Objection was, That it doth not appear by the Plea when the Demandant entered, for if it was before the Writ brought, or pendente Brevi, or after the last Continuance, it ought to be pleaded accordingly.

The Books cited to prove this are, *Rastal, Venire, plac.* 1. & 381. I cannot imagine what the Serjeant means by this, for there is no such Title in *Rastal.*

The next is 21 *H.* 6. *a.* but he doth not say in what *Folio*, and *Aston, 9 plac.* 30. is nothing to the purpose.

Draycote versus *Curzon Bar.*

Tempest. **Hill. 11 Will. III. Rot. 512.**

Derby ff. IN Dower, the Tenant pleaded in Abatement, That in such a Term he sued the Demandant per nomen of Jane Draycote, tunc nuper of Loscoe, &c. and for not appearing she was waived, &c. unde petit judicium.

The Demandant replied, That die impetrationis brevis originalis, upon which the Outlawry was pronounced, she lived at Stanley in Oxfordshire, and traversed that she lived then at Loscoe.

And upon Demurrer it was insisted on the behalf of the Tenant, That though the Outlawry for this Reason might be erroneous, yet 'twas not void, nor so much as voidable but by Writ of Error, or by the Plea of the Party on the Roll itself, she appearing in Court upon the Capias utlagatum, which she had not done. 2 Inst. 670.

But the Outlawry being a Judgment in Law, and in force, must be reversed in a proper Manner, that is, by one of those ways above mentioned, and shall never be set aside by Plea in a collateral Action.

Then some Exceptions were taken to the Plea.

1. That it was alledged, The Demandant was impleaded by the Name of Jane Draycote tunc nuper of Loscoe, but that the Word tunc should be omitted.

This being only a superfluous Word, that Objection was not allowed.

2. The Tenant had not averred, That Jane Draycote, who was outlawed, and the now Demandant, was one and the same Person.

But it was answered and resolved, That the Defendant having set forth, that prædicta Jana ought not to be answered, for that she was impleaded per nomen Janæ Draycote, and then shewing that prædicta Jana was waived, that the participle Prædicta was a sufficient Averment of the Identity of the Person.

3. That the Outlawry ought to be pleaded sub pede sigilli, which is true, if it had been in another Court; but it being in the same Court from which it proceeded, there is no occasion of pleading it sub pede sigilli; and so the Writ was quashed.

The Serjeant hath added a *Nota* of his own, *viz.* That in the Writ of Error is awarded, the Statute of Additions requires, that the Condition and Dwelling of the Party should be inserted; and therefore when you express the Quality or Degree of the Person, you must not say nuper Ar; but it must be set forth as 'tis, die impetrationis brevis; but 'tis otherwise where you mention the Dwelling, for there you may say nuper of such a Place, because Men often change their Habitations. 1 H. 5. ca. 5.

This seems to be a very slender Reason for such a Distinction, and the contrary is the most true; for Men change their Qualities oftner than they do their Habitations; and 'tis as easy to set forth where a Man dwells *die impetrationis brevis, &c.* as 'tis to shew whether he was a Knight or Esquire at that Time.

Wallis versus *Savil*, & al.

Winford. Hill. 13 W. II. Rot. 1506.

York ff. TRESPASS against three Defendants. All of them plead the General Issue as to part, and as to the residue they plead in Bar, That the Plaintiff brought an Action. &c. against two of the three Defendants and others, for the same Trespass, and they conclude their Plea in Bar; and it was held ill, because all three of the Defendants had pleaded an Action depending against two of them, and said nothing to the third; and though the Matter it self was properly pleadable in Abatement and not in Bar, yet the Defendants having begun and concluded their Plea in Bar, the Judgment was quod (the Plaintiff) recuperet damna, &c.

And to prove that Judgment final shall be given upon a Plea in Bar, where the subject Matter is only in Abatement, these Cases were cited.

Cro. Eliz. 202. *Sid.* 189. ff. A Man was bound in an Obligation to *three* Persons, and *two* of them bring an Action of Debt; the Defendant pleaded *in Bar*, that he became bound to these *two*, and to another: This is Matter in Abatement only, but yet Judgment final was given.

1 *Mod.* 239. So where Debt was brought against an *Executor*, the Defendant pleaded *in Bar* that he was *Administrator*; this should have been pleaded in *Abatement*, but being in *Bar*, the Plaintiff had Judgment *quod recuperet debitum, &c.*

Pract. Reg. 241. *Style* in his *Practical Register* tells us, That a Plea which is properly in Bar may be pleaded by way of Abatement; and that which is proper in Abatement may be pleaded in Bar; but he says, this doth not hold in all Cases; and I think it holds in very few, for if it should be allowed, it would certainly introduce a great Disorder in Pleading.

1 *Inst.* 303. *a* This is my Lord *Coke*'s Opinion, That good Matter ought to be pleaded in good Form, otherwise great Advantages may be lost, which appears plainly in this Case, where good Matter was pleaded in an ill Form, that is, it was pleaded in Bar, which is called by *Bracton*, and other old Writers, *exceptio peremptoria*, in which Judgment final may be given, and that destroys the Action for

ever; whereas if it had been pleaded in Abatement (as it ought) then the Judgment had been given againſt the Plaintiff; his Action would have only ceaſed for a Time, and he might begin again by a new Writ or Plaint, as the Caſe required.

'Tis true, in ancient Times the Pleadings were very plain, becauſe the Matter was then more regarded than Forms; but in the Reign of *Ed.* 3. my Lord *Coke* tells us, Pleading grew to Perfection, and then more Exceptions were taken to Forms than to the Matter it ſelf.

Agreeable to this was the Opinion of Juſtice *Thorning*, many Years before, *viz.* That ſuch a plain way of Pleading, (where the Matter, and not the Forms, was regarded) was very feeble to what it was in the Reign of *Ed.* 2. and yet we hear of no Cauſes either loſt or delayed by ſuch feeble Pleading, which could never have eſcaped the diligence of my Lord *Coke*, who was ſo great an Advocate for Forms, that he tells his Reader, they conduced to the right Underſtanding of the Law, and that 'tis a neceſſary part of a good Common Lawyer to be a good Pronotary: And yet he farther tells us, That many Cauſes were loſt when Pleading was at Perfection, that is, when the Subſtance and Matter it ſelf was not ſo much regarded as the Forms of Pleading, which began, as he obſerves, about the beginning of the Reign of *Ed.* 3. and in a few Years was improved to ſuch Niceties, that a Law was made even in that Reign, That no Man ſhould be prejudiced by the Forms of Pleaders, ſo as the Matter of the Action was ſet forth in the Declaration.

Co. Litt. 168.

idem. 303. *a.*

36 *Ed.* 3. *cap.* 15.

But notwithſtanding that Statute, the Serjeants at Law (who for their Skill in Pleading, were by the old Writers called Counters) had ſpun this part of the Law ſo fine, and made it ſo intricate by Forms, that the Parliament, *Anno* 27 *Eliz.* found it neceſſary to make another Statute, giving the Judges Power, after Demurrer joined, to give Judgment according to the Right of the Cauſe, and Matter in Law, without regard to Forms in Pleading, excepting ſuch Omiſſions or Defects as the Party demurring ſhall particularly expreſs and ſhew for Cauſe of his Demurrer.

27 *Eliz. c.* 5.

But ſtill the Opinions of Men did ſo far lean towards Forms, that ſome Omiſſions and Defects therein have been taken to be Matter of Subſtance: As for inſtance, an immaterial Traverſe; the Omiſſion of entring Pledges on the Bill or Declaration; the Omiſſion of a *Profert hic in Curia*, where a Deed is mentioned in the Declaration, or in any Letters of Adminiſtration; the Omiſſion of *vi & armis & contra pacem*; the Want of an Averment, *viz. & hoc paratus eſt verificare*; or not alledging *prout patet per recordum*; all which are only Matters of Form, and yet they have been held to be Subſtance.

Therefore *Anno* 4 *& 5 Annæ*, another Statute was made, That after Trinity Term 1706. no Advantage or Exception ſhall be taken to the Pleading for any of thoſe Omiſſions, unleſs it ſhall be particularly ſhewn for Cauſe of Demurrer.

Wentworth versus *Squibb.*

Winford. **Paſ. 13 Will. III. Rot. 495.**

Midd. ſſ. DEBT on a Bond and Judgment.

The Defendant was one of the Clerks of the Exchequer, and to this Declaration he Imparled Specially, thus, ſſ. Salvis ſibi omnibus & omnimodis exceptionibus, &c. tam ad jurisdictionem Curiæ quam ad breve & narrationem, and then pleaded his Privilege in Abatement.

And upon Demurrer the Queſtion was, Whether a Plea in Abatement could be pleaded after ſuch a Special Imparlance, which amounts to no more than an Imparlance with a Salvis exceptionibus tam ad Brevequam ad narrationem? for Salvis exceptionibus ad jurisdictionem Curiæ was never ſeen before.

As to this Matter, Dr. *Cowel* in his *Interpreter*, tells us, That a Special Imparlance is, where the Party requireth a Day to deliberate, adding theſe Words, *viz. Salvis omnibus advantagiis tam ad juriſdictionem Curiæ quam ad breve & narrationem*; and for this he cites the methodically learned *John Kitchin*, as he is called in the Title-Page to the *Engliſh Edition*, and Mr. *Townſend* himſelf cites the ſame Author to the ſame purpoſe, *fol.* 200. but it muſt be in the *French* Edition, for I have look'd into that *folio* of the *Engliſh* Book, and there is nothing relating to this Matter, but in *fol.* 395. 'tis ſaid, That after an Imparlance one cannot plead to the *Juriſdiction*, unleſs it be after a Special Imparlance. *ſſ.* Saving all Advantages as well to the *Juriſdiction* of the Court, as to the Writ and Declaration; and to prove this, the Year-Book 7 *H. 6. fol.* 39. was cited by Mr. *Kitchin*. I have likewiſe peruſed that Book, which doth not warrant this Imparlance, for 'tis only *Salvis exceptionibus ad billam & perſonam & advantagiis ſuis quibuſcunq;*

Kitch. 200.

Townſ. Tab. 193.

I have been the larger upon this Matter, to ſhew how eaſily ſome Men of Figure have been impoſed on by a Miſtake of a very indifferent Author, and how they have propagated an Error without any manner of conſideration.

But in the principal Caſe the Judgment was, That the Defendant ſhould anſwer over, and that he ought not to plead ſuch a Plea after ſuch an Imparlance; but if it had been as in Clapham's Caſe, then he might have pleaded it, which was thus:

Hardr. 365.

ſſ. Debt upon an Eſcape after Execution brought in the Exchequer. The Defendant *venit & defend. vim & injuriam quando, &c. & ſalvis ſibi omnibus advantagiis quoad Billam præd' petit licentiam, &c.* and then pleaded his Privilege as Marſhal of the King's Bench; and it was held he might, becauſe it was *quoad Billam* only: So in this Caſe, if it had been *Salvis omnibus advantagiis quibuſcunq;* he might

have pleaded his Privilege afterwards; but it being *tam ad Breve quam ad narrationem* he could not; because those must be such Exceptions and Advantages as the Law gives to that very Writ or Declaration; so that by acknowledging such manner of Proceedings, the Jurisdiction of the Court was affirmed. 22 H. 6. 7.

But after all, there is no occasion for a Clerk of the Exchequer to plead his Privilege, because 'tis allowed of course upon a Baron's producing the Red Book.

Accompt.

Andrews & Ux. & *Cocket* versus *Robsert.*

ACCOMPT by Husband and Wife, and one Cocket, against the Defendant as Receiver, &c. wherein they declare, That the Defendant received the Money of the Wife dum sola, and likewise the Money of Cocket, by the hands of one John Wase, ad computum reddend'.

The Defendant pleaded that he never was Receiver; and Issue thereon; and the Jury find that one Charles Williams gave 100 l. for the Relief of the Wife and of Cocket, which he delivered to John Wase, for the purpose aforesaid; that Wase delivered the Money to the Defendant; and so they made a general Conclusion, and Judgment was given quod computet.

Afterwards the Defendant was taken upon a Capias ad computandum, and committed to the Fleet, and being brought to the Bar, the Court assigned Auditors, and they appointed a Day and Place for the Defendant to accompt.

The Defendant put in Bail to appear on that Day, and so from Day to Day till the Accompt was perfected, and to pay the Debt if he should be found in Arrears, or to render the Defendant to Prison.

The Accompt was adjusted and brought into Court by the Auditors, and the Defendant by way of Discharge, craved an Allowance to be made for the Education, Meat, Drink and Cloths, of the Plaintiffs for eight Years, which amounted to the Money in demand, and upon this they were at issue,

And a Trial was had at Bar, and upon the Evidence it appeared, that the Defendant did provide Meat and Drink, &c. for one of the Plaintiffs, and had expended the 100 l. upon that Occasion.

The Jury likewise found that the Defendant did not bring up ipsos (the Plaintiffs) for eight Years, as he had alledged, and thereupon the Verdict being against him, it was moved that he might be committed in Discharge of his Bail.

But the Plaintiff prayed an Elegit, and afterwards upon Consideration he took the Body in Execution, which was committed to the Fleet, and this Judgment was affirmed upon a Writ of Error.

This is a Report out of a Manuſcript in Juſtice *Warburton*, but without any Term, Number, Roll, or in what Court the Pleadings were entered; but I ſuppoſe it was in the Common Pleas, for the Form of the Declaration ſhews it to be ſo, and *Warburton* was a Judge of that Court about the beginning of the Reign of King *James* the Firſt; ſo that I cannot tell of what Authority this Precedent may be to us; only I muſt ſay, that Actions of Accompt are now almoſt diſuſed: 'Tis true, they made a large Title in the old Books, but the Proceedings being very long and tedious, and there being a neceſſity of having two Judgments before the Plaintiff would have any benefit of his Suit, therefore a new way was found out to declare upon an *inſimul computaſſet*, which is now almoſt wholly in uſe.

Dighton & al' verſus Whiting.

Hill. 6 W. III.

Briſtol ſſ. ACCOMPT againſt the Defendant as Bailiff, brought by eight Plaintiffs, viz. by ſeven in their own Names, and by one as Executrix to her husband, in which they declare, That the Defendant had their Goods which they particularly mention, ad Merchandizand and to give an Account of the Profit, &c.

He pleaded an Award in Bar.

That all Suits between the Parties ſhould ceaſe, and that ſeven of the Plaintiffs, or ſome one of them, ſhould pay 30 l. to the Defendant, at or before the 4th Day of May, &c. and that they ſhould take all the Goods which the Defendant left in the hands of one Ignatius Warren in Mary-land, for their Uſe.

That there being a Difference between the Parties, concerning the Freight of two Tuns on the Ship Amity of Briſtol, in her laſt Voyage to and from Virginia and Maryland, which Freight the Defendant hired of Nathaniel King, at 10 l. per Tun, and the Plaintiffs alledged it to be at 16 l. per Tun, now if the ſaid King, ſhould within four Months, &c. make Oath before the Mayor of Briſtol, that the Freight was let to the Defendant at 16 l. per Tun, and if the ſaid Defendant ſhould within a Fortnight after the ſaid four Months, make Oath, that he took the Freight at 10 l. per Tun and no more, that then the Plaintiffs, or one of them, ſhould pay 25 l. more to the Defendant.

That mutual Releaſes ſhould be given.

This was the Subſtance of the Award now pleaded in Bar, and to this Plea the Plaintiffs demurred, and the Defendant joined in Demurrer.

The Serjeant tells us, that the Chief Justice *Treby* delivered the Opinion of the Court for the Plaintiffs, giving this Reason for it, but there he breaks off, and being of Counsel himself for the Plaintiffs, he was so full of his own Argument, that he forgot to give the Reason of the Judgment, but proceeds to acquaint the Reader with what Objections he made against this Plea.

1st. That an Award cannot be pleaded in Bar, unless it appear that the Plaintiff had either a present Satisfaction awarded for his Demand, or that the Award was executed before the Action brought, or for which the Plaintiff might have an Action.

The Difference is thus, viz. where Money is awarded to be paid, and the Day of Payment is past, there you must plead that the Award is actually executed, either by Payment of the Money, or by a Tender and Refusal, which in Law amounts to a Payment.

If the Day is not past, then the Defendant may plead the Award it self, because the Plaintiff has a proper Remedy to recover the Money awarded by an Action of Debt.

Roll's Abr. Tit. Arbit. 266, 267. 19 H. 6. 38.

But if the Award is to do any collateral Thing, as to seal a Bond, &c. there if the Day is past, the Defendant shall not plead the Award in Bar, without an actual Performance, or shewing that he was hindered by the Plaintiff.

There are some Books which prove, that 'tis sufficient for the Defendant to plead that he was always ready to perform the Award, but there are many which prove such is not a good Plea.

As to this Matter the Serjeant hath jumbled many Cases together, which I shall thus apply.

In 7 *H.* 4. 30. *b.* in Trespass, the Defendant pleaded an Award, by which he was to give the Plaintiff a piece of Cloth, which he was always ready to do, and this was held a good Plea.

In 45 *Ed.* 3. 16. *a.* likewise in Trespass for taking his Goods, the Defendant pleaded an Award that he might retain part, and that he should deliver the rest, which he had been always ready to do.

Bro. Arbitr. 7. My Lord *Brook* in abridging this last Case tells us, there was no Judgment in it, so that 'tis not of any Authority.

These are the two Cases which prove, that an Award to do a collateral Act may be pleaded without Performance.

Roll's Abr. fol. 267. But in Mr. *Roll's Abr.* there are many Cases where an Award is no Plea in Bar without pleading likewise an actual Performance; but all those Cases are where Money is awarded to be paid, and so is *Hore* and *George's* Case.

Cro. Eliz. 66.

19 *H.* 6. 6. The Year-Book 19 *H.* 6. 6. is nothing to the purpose; it was upon a Bond of Submission to arbitrate *de jure titulo & possessione*, and the Award was of the Possession only, and it was held good.

22 *H.* 6. 52. And 22 *H.* 6. 52. is no more then a Traverse of the Time and Place, when and where the Award was made.

That which was most insisted on to maintain this Plea was, that by the Award all Suits were to cease, which amounts to a present Satisfaction.

To which it was answered, That such an Award would be good where the Parties had entered into Bonds for its Performance, because he who acts contrary to the Award, hath forfeited his Bond, and the other may take his Remedy against him upon that Bond thus forfeited.

But if there be no such Bonds, (as there were none in the principal Case) then the Award cannot be pleaded in Bar to an Action brought by the Plaintiff, because such Award is executory, and there is no means to enforce the Performance, or to have Satisfaction if 'tis not performed; and as to this purpose there is no difference between an Accord and an Award, where a Man hath no Remedy to compel the Performance of the one or the other.

Now an Accord that the Parties shall be acquitted of each other, cannot be pleaded in Bar to an Action brought by one of those Parties against the other, because the Accord it self is no Satisfaction, and this is as strong as an Award, that all Suits shall cease. Roll's Abr. tit. Accord, 108.

Another thing insisted on for the Defendant was, that Satisfaction was awarded to the Plaintiffs, because the Award was, that they should take their Goods which were delivered to Mr. Warren in Maryland, for their use.

To which it was answered, 1. That could be no Satisfaction, because it could not be presumed that the Goods would be delivered without an Oyer from the Defendant; that the Delivery depended wholly on the Pleasure of Mr. Warren, and if he should refuse, there was no Remedy to compel him, or to have Satisfaction.

But the plainest answer to this Plea is, viz. That every Thing awarded to be done by the Defendant, is no more than one entire Satisfaction of what was demanded by the Plaintiffs in this Action; so that admitting one part of the Award to be good, yet that will not be sufficient, because the whole ought to be good, and not only so, but to be performed; so that if one part is void, that will make the whole void, especially where the Submission is conditional, viz. with an Ita quod, as it was in this Case, for that ties the Award to every Thing contained in the Submission. Cro. Eliz. 838. 2 Cro. 200, 354, 584. Dyer, 216. b.

The Books cited in this Case, and which may be in any manner applicable to it, are placed in the Margent, but *Dyer* 240, 241. is nothing to the purpose; it was no more then thus: *ff.* A Termor for Years assigned his Term, and covenanted that *he* had not made any former Grant, by which that Assignment might be impeached; *but that* the Assignee should quietly enjoy without Disturbance from any Person: It was held that the last part of this Covenant was *general*, *viz.* That the Assignee should quietly enjoy against *all Persons*; but it was restrained by the particular Words in the first part, *viz.* from all Persons claiming under *him*; for it was an entire Covenant, and the latter part of it depended upon the former, which was only against himself and his own Acts.

But though this was not much to the purpose, the Serjeant would be sure to cite a Case that was so, for he has cited this very Case to prove it self; for what else doth he mean by the very last Line.

ff. Vide

ff. *Vide anxi par ceſt caſe le caſe de Bighton & al. verſus Whiting?* I ſuppoſe it ſhould be *Dighton* inſtead of *Bighton.*

Peirce verſus *Clarke.*

Cooke. **Mich. 11 Will. III. Rot. 787. C. B.**

Suſſex ff. ACCOMPT againſt the Defendant as Bailiff, &c. for 132 Buſhels of Wheat, to the value of 20 l. The Defendant pleaded that he fully accompted de prædict' 132 Buſhels.

The Plaintiff replied quod non, &c. and upon this they were at Iſſue; and the Plaintiff had a Verdict at the Aſſizes, That the Defendant had not accompted for the ſaid 132 Buſhels of Wheat, and the Judgment was quod computet, and thereupon a Capias ad computandum was awarded, and the Defendant appearing, there were Auditors aſſigned, and he was bound with Sureties to appear before them till the Accompt was adjuſted, and alſo to appear in Court after the Auditors had delivered in the Accompt, and until the ſame was ended; and that he ſhould ſurrender himſelf to Priſon until he ſhould pay the Arrears, if the Judgment ſhould be againſt him.

Afterwards the Auditors delivered in the Accompt as followeth.

ff. That the Defendant confeſſed the Receipt of 120 Buſhels of bad light Wheat ad Merchandizandum, &c. but that to make that Wheat fit for Sale, he at the Requeſt of the Plaintiff, did mingle and grind it with Ten Buſhels of the beſt Wheat, and carried the Meal to Portſmouth, and ſold it there for 18 l. that he had paid 10 l. part thereof to the Plaintiff, and craved Allowance of that Sum, and likewiſe of theſe Particulars following.

	l.	s.	d.
ff. For new Winnowing the firſt two Load.	00	02	6
Item, For grinding the ſame and Toll.	00	07	6

And ſo enumerates ſeveral Particulars in Engliſh, and upon Demurrer the Plaintiff had Judgment to recover for ſo much as he had declared, and not ad valorem.

1. One Reaſon was, becauſe the Defendant had given in his Diſcharge in Engliſh when it ought to be in Latin, and ſo are all the * Entries.

* Raſt. 15 a. 16 b. Coke's Ent. 47. Winch. 2, 3.

2. By this Plea the Defendant had confeſſed the Receipt of 132 Buſhels, by alledging that he Plene computavit for ſo much, but he accompted before the Auditors only for 120 Buſhels, ſo that this muſt be an imperfect Accompt.

And in ſuch Caſe the Serjeant makes a *Quære*, Whether the Judgment ſhould be *quod recuperet* 132 *Buſhels* according as the Plaintiff had declared, and ſo proceed to a Writ of Enquiry for the *Value?*

or whether it ſhould be *quod recuperet valorem, viz.* 25 l. for which he had likewiſe declared?

Then he adds a *Nota*, That the Judgment ſhould be as in this Caſe it was, viz. recuperet 132 Buſhels, and that if it had been ad valorem it had been naught; for 'tis the ſame Thing where the Defendant refuſes to accompt, and where he gives in an imperfect Accompt: Now if he had refuſed to accompt, in ſuch Caſe the Judgment ad valorem had been wrong; and to prove this he cited *Williams* and *White*'s Caſe. *Cro. Eliz.* 806.

But I think the Serjeant himſelf was wrong in citing that Caſe, for it doth not prove this Matter.

Iſſ. It was in Accompt againſt the Defendant as *Bailiff, &c.* for Goods *to the Value of* 100 *l.* The Defendant made Default, and the Judgment was, that the Plaintiff *recuperet valorem bonorum præd'. viz.* 92 l. 10 s.

Now the Court held, That where the Defendant made Default, they might give Judgment that the Plaintiff *recuperet valorem* for which he had declared; but the Judgment in that Caſe differed from the Declaration, becauſe 92 *l.* 10 *s.* could not be 100 *l.* and for that Reaſon that Judgment was reverſed, and not becauſe it was *quod recuperet valorem*; ſo that this Caſe proves the very contrary for which it was cited.

His next *Quære* is, Whether there ought to be a Writ of Enquiry, if the Defendant in the beginning of his Plea had taken the Value of the Wheat by Proteſtation? And for this he bids us look into *Bowle's* and *Broadhead*'s Caſe, which I have done, and 'tis thus: *Aleyn* 88.

Iſſ. In Debt for 200 *l.* for Tithes in *Royſton.*

The Defendant pleaded, That at the Diſſolution of Monaſteries the Lands were *diſcharged* of Tithes in the Hands of the Prior, *&c.* and the Iſſue was upon the *Diſcharge*; but at the Trial the Defendant did not maintain his Plea, ſo the Court directed the Jury to find for the Plaintiff to the *Value of* 200 *l.* becauſe the Iſſue being joined upon the *Diſcharge*, which was a collateral Matter, the Defendant had thereby *confeſſed the Value* of the Tithes to be as the Plaintiff had declared, *viz.* 200 l. but that he was diſcharged of Payment of any Tithes at all.

Now ſo much of the Caſe doth not concern the Serjeant's *Quære*, but there is ſomething farther in it, *viz.* The Court ruled the *Value* to be taken by ſuch an implied Confeſſion, not only becauſe the Iſſue was joined upon a collateral Point, but becauſe the Defendant in that Caſe did not take the *Value by Proteſtation*, from which it may be inferred, that if he had, then the *Value* muſt be adjuſted by a Writ of Enquiry, which is all that can relate to this *Quære.*

And certainly the Serjeant hath ſhewed an excellent Point of Learning, thus to raiſe a Queſtion, which is in no ſort pertinent to the Principal Caſe, and then ſeemingly to ſolve it by an Inference from another.

Action on the Case.

Holt versus *Bruche.*

ACTION on the Case by a Sheriff for an Escape, setting forth that one Blomer, sued out a Ca. sa directed to a former Sheriff, against the Defendant and one Colston, who were Bail for one Langtree.

That this Writ was delivered to the old Sheriff, who took the Defendant Bruche, and returned a Cepi Corpus, &c. and that he was languidus in Prisona, and that Colston the other Bail non fuit inventus.

That the Plaintiff was afterwards made Sheriff, and that the Defendant was turned over to him in Execution, who brought an Habeas Corpus.

That by virtue of that Writ, the Plaintiff brought the said Bruche to London, where he escaped; and that Blomer brought an Action against the Sheriff (the now Plaintiff) for that Escape, and recovered; and this he lays to his Damage of 200 l.

The Serjeant tells us, This Precedent was collected out of a Manuscript of Justice *Warburton*, and that was in Queen *Elizabeth*'s Reign, but there is neither Term or Number-Roll to it; we are told likewise, that this Manuscript is in his Hands, which may be a sufficient Authority for him to vouch it, and serves well enough to inlarge the Book.

Lloyd versus *Street* & al'.

Shropsh. ff. CASE, wherein the Plaintiff declared, That he being a Man of Credit and Repute, and the Defendants colore legis designing to oppress and imprison him, did maliciously, and without Cause, procure an Action to be entered against him in the Sheriff's Court at Chester, for 180 l. and obtained Judgment and took him in Execution, when in truth he never appeared to that Action, by reason whereof he was discredited; so that several Persons

ſons charged him with Actions, &c. and this he lays to his Damage of 500 l.

He tells us, This Declaration was drawn by my Lord Chief Juſtice *Pollexfen*, but there is no Proceeding upon it, and all that can be ſaid for it is, That 'tis of a later Date than Juſtice *Warburton*'s Manuſcript, and for that Reaſon may be of better Authority.

Pritchard Mil. verſus *Papillion*.

Paſ. 36 Car. II.

London ſſ. CASE, &c. wherein the Plaintiff declared that he was Lord Mayor of London; and that he ought to attend that Office for the better Government of the City.

That the Defendant being one of the Commonalty of that City, and under the Government of the Plaintiff, proſecuted a Capias againſt him without any Cauſe, directed to the Coroner, who arreſted him, and kept him in Cuſtody ſix Hours, and this he lays to his Damage of 1000 l.

This was a very extraordinary Caſe, for which Reaſon, I believe the Serjeant reported it; and not that it ſhould be a Precedent in another Caſe of the ſame Nature; for as we never read of a Lord Mayor that was arreſted in the Time of his Majoralty before, and in Time of Peace before Sir *William Pritchard*, ſo the like may never happen again.

Bradley verſus *Gill*.

Tempeſt: Hill. 3 & 4 Jac. II. Rot. 1890.

Worceſter ſſ. CASE, by a Writ of Privilege brought by a Prothonotary's Clerk againſt the Defendant, for a Nuſance in building a Smith's Forge near the Plaintiff's Houſe in Sturbridge, and for making ſuch a Noiſe with Hammers, that he could not ſleep, by which he was annoyed, and loſt the Benefit and Eaſement of his Houſe.

The Defendant pleaded in Bar, That he had uſed the Trade of a Blackſmith twenty Years and upwards in Sturbridge, and that he was Apprentice to that Trade; That the Plaintiff himſelf adviſed him to dwell in the ſaid Houſe and follow his Trade there, and that he did accordingly dwell there, and ſet up a Forge in an old Room, and worked there with his Servants at ſeaſonable Times, and traverſed, That he newly built a Smith's Shop aliter than as aforeſaid:

9 Co. 57. Hutt. 135. Palm. 536. Rot. *tit.* Action ſur le Caſe, 89. idem.

ſaid: And upon Demurrer it was held, That the Action lies; for though a Smith is a neceſſary Trade, (and ſo are many more, as a Lime-burner, and thoſe who keep Hogs in Sties for the Suſtenance of Man) yet it muſt be uſed ſo as not to be injurious to the Neighbours.

Benſon verſus *Muſgrave.*

Belvin. Trin. 2 Jac. II. Rot. 1652.

Cumb. ſſ. CASE againſt a Sheriff for an Eſcape, ſetting forth, That the Plaintiff bought a Capias in Cotſpoſs againſt one Hayes, with an ac etiam for 33 l. by Vertue whereof he was arreſted, and afterwards eſcaped.

The Defendant pleads in Bar, That after the Time of the Eſcape, and at the Return of the ſaid Writ, the aforeſaid Hayes, by the Conſent and Leave of the Plaintiff himſelf, appeared as by the Record ejuſdem comparentiæ it doth appear, & hoc paratus eſt verificare.

The Plaintiff replied, Nul tiel Record of the Appearance of the ſaid Hayes, by the Conſent and Leave of the Plaintiff.

And upon Demurrer it was objected, That the Replication was ill, for it was ſufficient for the Defendant to allege that Hayes appeared; but in no wiſe to ſay, That it was with the Plaintiff's Conſent; therefore the Defendant ought to have traverſed the Record of Appearance only.

But then it was ſaid, That the Bar was not good.

Hob. 210. *Latch* 149. *Jones* 138. *idem.*

The Serjeant doth not ſhew for what Reaſon; we are to find out that by the Caſes which are cited; and the Reaſon ſeems to be thus:

ſſ. The Defendant had not well concluded his Plea, for 'tis *hoc paratus eſt verificare* only.

2 *Roll. Rep.* 119.

Now the rendering the Body in Diſcharge of the Bail, is an Act in Court, and Matter of Record; and therefore he ought to conclude, *& hoc paratus eſt verificare per recordum.*

The Caſe was not adjudged, but the Parties mended their Pleadings, by Conſent.

Grammer

Grammer versus *Watson*,

Cooke. Pas. 1 Jac. II. C. B. Rot. 377.

Nottingh. ff. CASE, for that Sir William Child was Firmarius of the Manor of Oxton Netherhall, whereof twenty Acres in Blydworth were Parcel and Coppyhold, and that he and all those * whose Estate he had, &c. Time out of Mind, had Common of Pasture in a Waste called Alamore in Blydworth, for all commonable Cattle levant and couchant on the said twenty Acres, as belonging thereunto.

That Sir William Child, at a Court held for the said Manor, granted the said twenty Acres to the Plaintiff in Fee, who entered, and that the Defendant deprived him of the Benefit of his Common by putting in his Cows and Sheep, &c.

The Defendant pleaded in Bar, and confessed that Sir William Child was Firmarius of the Manor, and that the twenty Acres, &c. were Coppyhold, and he likewise confessed the Right of Common, &c. and the Grant to the Plaintiff, &c.

But said, That the Archbishop of York was seized in Fee of the Manor of Southwell, of which one Messuage, thirty Acres of Land, ten Acres of Meadow, and thirty Acres of Pasture in Farnsfield, were Parcel and Coppyhold.

That the Archbishop, and his Predecessors and Tenants, had Time out of Mind Common of Pasture in the said Waste called Alamore, for all commonable Cattle, levant and couchant upon the said Lands.

That the Archbishop, by his Steward, granted the said Messuage and Lands to the Father of the now Defendant in Fee, and that after his Death the Defendant entered; and so justifies the putting in his Cows and Sheep.

The Plaintiff replies the same Matter as in his Count, and traverses the Prescription in the Bar.

The Defendant rejoined, and Issue was taken upon the last Prescription; and a Special Verdict found.

ff. That the Waste of Alamore is in the Forest of Sherwood, and that the Messuage and Lands mentioned in the Bar, are within the Purlieus of the said Forest.

That the Archbishop and his Tenants had Time out of Mind Right of Common in the said Waste for all commonable Cattle, &c. but they doubted whether he could prescribe to have such Common in a Forest, as belonging to Lands in the Purlieus, and so made a General Conclusion.

Upon the arguing this special Verdict, an Objection was made to the Prescription in the Bar, because neither the Fence-month nor Sheep were excepted.

* He who is seized in Fee ought to prescribe by a *Que Estate*, and not *Firmarius*.

At which the Serjeant very much wondered, becauſe the ſame Objection might be made to the Preſcription in the Declaration.

But I think 'tis no ſuch wonderful Thing for the Plaintiff's Counſel to overlook a Fault in the Declaration, and find out as many as he can in the Plea.

Now if this is a Fault, 'tis a very plain one; and therefore one might wonder if the Defendant's Counſel did not inſiſt on it, eſpecially where he was put in mind of it by the other Side.

But the only Queſtion ſeems to be, Whether ſince the Preſcription is for all commonable Cattle, which generally includes *Sheep*, Whether thoſe ſhould not have been excepted as Cattle not commonable in the *Foreſt*?

The Serjeant hath cited ſome Authorities, which he affirms to be in Point, That a Man may preſcribe to a Right of Common in a Foreſt *for Sheep*.

The firſt is *Webb*'s Caſe, in which I think he is alſo miſtaken for the Caſe is thus:

1 *Roll. Rep.* 411. *Webb* was fined by the Chief Juſtice in Eyre, for a Treſpaſs in a Foreſt with his *Sheep*, and committed for Non-payment of the Fine; and whether that Commitment was legal or not was the Queſtion. *Doderidge* ſaid, That a Man might have *Common of Paſture* in a *Foreſt* by Preſcription, which muſt be intended for *Sheep* as well as other commonable Cattle; or otherwiſe, 'tis not to the Purpoſe: 'Tis true, he did not mention *Sheep*; but if he had, 'tis only the Opinion of a ſingle Judge, which cannot be of any great Authority.

3 *Bulſt.* 213. The ſame Caſe is reported by *Bulſtrode*, and there *Doderidge* is made to ſpeak a little plainer. *ff.* That a Man cannot have Common of Paſture for *Sheep* by the Foreſt-Law, to which my Lord *Coke* agreed; but ſaid he might by Preſcription; and in his 4th *Inſtitutes* 4 *Inſt.* 298. 2 *Cro.* 155. he tells us, That it was reſolved by all the Judges of *England*, That a Man might have Common by Preſcription in the King's *free Chaſes for Sheep*; and that it was his Opinion one might have the like Preſcription in the *King's Foreſts*: For though by the Foreſt-Law *Sheep* are not commonable there, becauſe they bite ſo very cloſe; yet ſince moſt of the Statutes concerning Foreſts are only declarative *antiqui juris*, therefore a Man may preſcribe againſt them as well as againſt the Common Law it ſelf, upon a juſt and reaſonable Cauſe; and ſuch a Preſcription may have a lawful Beginning by the King's Grant.

All this may be true, and yet it doth not ſeem to come up to the Preſcription in the Bar.

3 *Lev.* 98. For 'tis admitted, That a Man may preſcribe *generally* for Common of Paſture in a *Foreſt*, and yet by ſuch a general Preſcription, *Sheep* as well as other Cattle may be included, as where 'tis *pro omnibus averiis*, there it muſt be for Sheep as well as Horſes and Cows, *&c.*

But it may ſtill remain a Doubt, Whether a Preſcription for a Common in a *Foreſt pro omnibus averiis communicabilibus* can be good without excepting *Sheep*? becauſe by the Word *Communicabilibus*, the Preſcription is reſtrained to ſuch Cattle which are *commonable* there; and by the Foreſt-Law Sheep are not.

The next is *Englefield*'s Case, and there Justice *Jones* tells us, That at a Justice-Seat held for *Windsor* Forest, *Englefield* prescribed to a Right of Common appendant to his Manor of *L.* for all Cattle *commonable*, and it was allowed; and this is applicable to the principal Case in Point. *Jones*, 285.

And as for the *Fence-month*, a Man may prescribe for Common generally in a Forest, without excepting the *Fence-month*, and so it was ruled in * *Trigg* and *Turner*'s Case; in which Case the Serjeant tells us, That the Prescription was for *Common for Sheep*, but that is a Mistake; for 'tis no otherwise than for *Common generally*, by which *Sheep* may be understood. * 3 *Lev.* 98.

Judgment was given for the Defendant.

Prideaux versus *Morice.*

Trin. 12 W. III. C. P. Rot. 655.

Cornwall. CASE for a False Return of a Member to Parliament; Upon not guilty pleaded, the Jury found a Special Verdict to this effect.

1. That a Writ issued out of Chancery, reciting, That John Morice, Esq; was chosen for Saltash and Newport, and that he made his Election to serve for Saltash, that the Sheriff was commanded to proceed to a new Election of a Burgess for Newport; that he made a Precept directed to the Chief Officer of Newport for that purpose, which was delivered to the Defendant, then one of the Chief Officers, &c. that they went to an Election, &c. and that the Plaintiff was chose, but that the Defendant had returned Francis Stratford, who was not duly chosen; they find that there had not been any Determination in Parliament, either of the Right of this or any other Election for the said Borough of Newport.

The Chief Justice delivered the Resolution of the Court, which was thus:

1. That this Action would not lie before the Election was determined in Parliament, which was the proper Court to determine this Matter; if it should lye, this Inconvenience might follow, viz. The Verdict might find contrary to what the Parliament might hereafter determine, which is not to be allowed; for 'tis plain, if the Parliament had determined against the Plaintiff, he could never afterwards have this Action.

Now though the Plaintiff might have a Remedy upon the Statute of H. 6. before any Determination in Parliament; yet that can be no Reason for this Action, because that Statute gives a particular Remedy to the Party grieved, viz. the Forfeiture of 100 l. and therefore shall never be extended to any other Purpose.

At

At Common Law there was no Remedy for a False Return; if there had, then to what purpose was the Statute made?

'Tis true, in Courts which have concurrent Jurisdictions, there cannot be different Judgments in one and the same Case, because the Determination must be in that Court which was first possessed of the Cause; for if an Action is brought for the same Matter in one Court, the Party may plead in Abatement, that 'tis depending in another; and if Judgment is given in the first Action, then he may plead it in Bar to the last.

But in this Case there may be different Judgments, because the Court of Parliament have a superior Jurisdiction in this Matter.

The first Action which was brought for a False Return, was by
2 Sid. 168. Nevil against Strode, the Sheriff of Berks, but no Judgment was given, which is a Presumption that the Action doth not lye.

2 Lev. 114. The Case of Bernardiston against Somes was for a Double Return, and though it was adjudged for the Plaintiff, and Somes was committed, yet Judgment was reversed upon the Matter in Law, viz. That an Action on the Case did not lye against him, though the Jury found that he made the Return false & malitiosè, which is a stronger Case than this at Bar.

3 Lev. 29. The Case of Onslow and Rapley was likewise for a Double Return, which is of the same Nature with a False Return, because in both Cases the Action is grounded upon the Falsity; and there it was held, that the Action did not lye.

This last Case was grounded upon the Authority of that of *Bernardiston*, in which there was great Variety of Opinion amongst the Judges; and though that Judgment was reversed in the Exchequer-Chamber, yet it so far alarmed the House of Commons, that some Years after it was pronounced, a Committee was appointed to
* 7 & 8 W. enquire into it as a Grievance; and since that Time an * Act hath been made to prevent any Inconvenience which might arise by it, *viz. That the last Determination of the House of Commons, concerning the Right of Elections, is to be pursued.*

Now the Reason why an Action on the Case would not lie for a *Double Return* is, Because the Law takes no Notice of such a Return; 'tis only allowed by the Custom of Parliament, and in Cases where the proper Officer cannot determine which is chosen, therefore when he doubts, he makes a Double Return, and submits the Choice to the Judgment of the House.

Now if the Parliament will admit such Returns, and make Determinations on them, it may seem hard that the Law should subject a Man to an Action for submitting a Fact to the Judgment of that High Court, who have not only an original and proper Jurisdiction of the *Matter* it self, but have likewise approved the *Manner* by which it came before them.

Thus much for a *Double Return*; but the Reason is not the same why an Action will not lie for a *False Return*.

ff. Such a Return is an apparent Injury to every Elector, though the greatest to the Candidate himself: Now if every Man who hath a Right to vote, may have an Action for such an Injury, this would

create a Multiplicity of Suits; therefore, to avoid it, the Law will not suffer any one of them severally to maintain an Action for such a Return.

Besides, the Right of Election being cognizable only by the House of Commons, the Candidate who is injured by a *False Return*, hath a proper Remedy there to recover his Seat in Parliament; and therefore the Law will not permit him to have another Remedy elsewhere.

Bayntine versus *Sharp.*

Midd. ff. CASE against the Defendant for keeping a mad Bull, which wounded the Plaintiff.

There had a Verdict, but the Judgment was arrested, because it was not alleged, That the Defendant did know the Bull to be mad.

It doth not appear when this Case was adjudged, nor in what Court, neither is there any Book cited in it.

Allen versus *Stephenson.*

Hill. 11 W. III. C. B.

Midd. ff. CASE for negligently keeping his Fire; setting forth, That by the Custom of England, every House-keeper is bound to keep his Fire safe at all Times, lest by the Neglect of his Fire, and of his Servants or Lodgers, any Damage should happen to another.

That the Defendant being a House-keeper in Chancery-Lane, took a Lodger, who kept his Fire so negligently that the Plaintiff's Goods were burned.

There was a Verdict for the Plaintiff, but the Judgment was arrested for the Strangeness and Insufficiency in the Declaration.

But what that was the Serjeant doth not tell us, so that the Reader must find it out as well as he can; probably it might be, that the Plaintiff had declared upon the Custom of *England*, That every House-keeper was safely to keep his *own Fire*, and alledged, that the Damage was done by the Fire of a *Lodger*; so he had not brought his Case within the Custom.

'Tis true, he sets forth, That the Master of the Family was so to keep his own Fire, lest by the negligent Keeping thereof, and of the *Fire of his Servants and Lodgers*, any Damage should happen, *&c.* which is not only insensible, but the Custom was never before extended to Servants and Lodgers.

Then he ſets forth, That *Bona & catalla* of the Plaintiff were burn'd and ſpoiled, but did not ſhew what Goods; for ſo is the Precedent in *Raſtal* 8. where the Plaintiff alledged, That his Goods were burn'd, *viz. decem carectat. maheremii.*

Hewet verſus *Copland.*

Winford. Trin. 2 W. & M. Rot. 1577.

Norwich ſſ. CASE, for that the Plaintiff was ſeized of a Meſſuage in Norwich, and of an ancient Garden thereunto belonging, which was planted with Fruit and Flowers, and had fine Walks in it.

That the Defendant had a Houſe contiguous, and that he built a Waſh Houſe and Stable, and Chambers over it to lay Hay, that he burn'd Sea-Coal in the Waſh-Houſe, which ſpoiled the ſaid Fruit-Trees, and that the Air in his Garden became unwholeſome by this means.

The Defendant pleaded in Bar a Cuſtom in Norwich to build ſuch Houſes, and preſcribed to burn Sea-Coal in them, and to put Horſes in Stables as often as they had occaſion; and ſo juſtifies the building, &c. and burning Sea-Coal there.

The Plaintiff replied de injuria ſua propria, and traverſed the Cuſtom as alledged in the Bar.

The Defendant rejoined, and alledged the Cuſtom as before, and upon this they were at Iſſue.

The Cuſtom which was tried was, Whether any Man could build a Waſh-Houſe or Stable on his own Ground, with Chimneys to burn Sea-Coal in them near another Houſe, ſo as the new Building did not obſtruct any old Light, nor the Rain fall from thence upon the old Houſe or Walls, *&c.* ? And this ſeems to be ſo reaſonable a Cuſtom, that one would think it ſhould never be controverted.

But the Declaration is very extraordinary; for if burning Sea-Coal in a Waſh-Houſe in *Norwich*, ſhould ſo far infect the Air of the next Garden as to make it unwholeſome; I would fain know, who could live near a Brew-Houſe in *London* ?

There are many Precedents of Actions brought for Nuſances, as for building of Hog-ſties, Houſes of Office, Slaughter-Houſes, or making Sinks, *&c.* but none for building Houſes to burn Sea-Coal in them.

The Serjeant tells us, **This Cuſtom was twice tried, and that nothing more was done in it.**

But I think two Trials were enough to decide a Cuſtom ſo very common, and that if the Plaintiff's Conſcience had been as tender as his Noſe, one Trial had been ſufficient.

Smith

Smith Bar. versus *Winford*.

Tempest. Mich. 5 W. & M.

Midd. ff. CASE against one of the Pronotaries, setting forth, That there are several Filazers of the Court of Common Pleas for every County to enroll Original Writs, and to enter Appearances; and that no Plaintiff in a personal Action ought to be nonsuited before the Defendant had entered his Appearance with the Filazer.

That the Plaintiff in Trinity Term Anno 1 W. prosecuted a Capias against one Edward Saban, ac etiam for 135 l. returnable quinden. S. Martini, by vertue whereof he was attested and imprisoned, and so ought to be until he put in Bail, or had entered his Appearance debite with the Filazer.

That the Defendant in Hilary Term following, signed a Supersedeas, reciting the aforesaid Capias, and that the Plaintiff did not prosecute his Suit; therefore if Saban was in Custody for no other Cause, the Sheriff was commanded to set him at large; and that he was accordingly discharged without Bail or Appearance; and avers, That he did not neglect to prosecute his said Writ, &c.

The Defendant pleaded Not guilty; and at the Trial the Plaintiff was nonsuit, because he had not entered his Issue in Time.

Cowper versus *Towers*.

Winford. Hill. 10 W. III. Rot. 1789.

York ff. CASE, for riding the Plaintiff's Horse to Death, and likewise Trover and Conversion for a Horse and a Mare.

The Defendant pleaded the Statute of Limitations in Bar to this Action.

The Plaintiff replied, That he filed an Original in Trespass against the Defendant, returnable Cro' Animarum 3 Will. with an Intent that he should appear, &c. and that the Plaintiff might declare against him as now he had done; and that he was guilty of the Premisses within six Years after the Filing thereof, & hoc petit quod inquiratur per patriam, &c.

The Defendant rejoined, That the said original Writ was prosecuted against him with an Intent to declare in Debt; which being a frivolous Rejoinder, the Plaintiff demurred.

But the Defendant had Judgment, because the Plaintiff had concluded his Replication to the Countrey, which he ought not to do; for, having set forth an Original other than that upon which this present Action was grounded, he should have given the Plaintiff Leave to reply to it; and therefore should thus conclude his Replication, viz. & hoc paratus est verificare.

This is not like the usual Case, where upon a plene Administravit the Plaintiff replies Assets at the Time of the Original ipsius querentis; for that must be intended the same Original, and can be no other.

The Serjeant makes a Note, That no Exception was taken to the Declaration, it containing two distinct Matters, viz. the turning one House and a Trover for another; and this is to be understood of several Cases which are there cited promiscuously.

8 Co. 47. b. In the 8th *Report* the Writ was *de Domibus*, and the Plaint was *de quatuor acris Salicti*, and to have reasonable *Estovers*; and it was challenged because the Plaintiff had joined two Freeholds in one Plaint, viz. the four Acres of Willows, and the Estovers; but it was not allowed.

So in *F. N. B.* 88. it is held, That an Action of Trespass on the Case and a Trespass *vi & Armis* may be joined; and so may any Actions where the Plea of Not guilty goes to all.

Sid. 244. Cro. Car. 20. Allen. 9.

Hassard versus *Cantrell.*

Tempest. Hill. 6 W. III. Rot. 1084.

Derby ss. CASE: The Plaintiff made a Title under four Sisters Coparceners, and prescribed in them for Right of Common in Hartshorne, as appurtenant to a Messuage there, &c. That the Defendant put in his Cattle, which eat the Pasture; and made a Warren in the Common, and Cony-Burrows, and hunted the Plaintiff's Cattle with Dogs, per quod he could not enjoy his Common in tam amplo & beneficiali modo as before.

The Defendant pleaded as to the Hunting, Not guilty; and as to the rest he pleaded in Bar, That he himself was seized in Fee of the Manor of Hartshorne, of which the said Common was Parcel, and that he in his own Right, and the other Defendant as his Servant, put the said Cattle into the Common, prout ei bene licuit.

Then they go on (without relying upon this Justification) and prescribe to have a free Warren within the said Manor, and so justifie the putting in Conies, &c. and making Cony-Burrows; and over, That the Plaintiff had sufficient Common.

The Plaintiff rejoins, and maintains his Declaration, and traverſed the Sufficiency of the Common, and likewiſe traverſed the Defendants Preſcription to a free Warren; and upon Demurrer had Judgment.

The Exception to the Bar was, That it did not appear that the Defendants had any Property in the Cattle which they put into this Common; for they alledged that they put in ten Horſes, and ſo many Mares and Cows, and the Defendants have juſtified the putting in the aforeſaid Horſes, &c.

Now they might be only poſſeſſed of theſe Horſes; and a Poſſeſſion without a Property will not be ſufficient in this Caſe.

The Serjeant reports, That the Court did not anſwer this Exception; the Reaſon may be, Becauſe it was not worth an Anſwer.

For though 'tis neceſſary in Treſpaſſes for taking Goods, that the Plaintiff ſhould alledge a Property in himſelf, becauſe in ſuch Caſe there may be two Intendments; one, That they were the Defendant's Goods, and ſo he might lawfully take them; the other, That they were the Plaintiff's, and then the Taking is wrongful; and that where the Conſtruction is indifferent, it ſhall always be moſt ſtrongly againſt the Plaintiff. *Yel.* 36. 2 *Cro.* 46. idem. 2 *Lev.* 20. 1 *Sid.* 184.

But certainly no Man can intend that the Defendants in the principal Caſe, put the Plaintiff's Cattle into this Common, or that he brought this Action becauſe his own Cattle were depaſturing there; ſo that they muſt neceſſarily be intended the Defendants Cattle: And if they ſhould have alledged a Property in themſelves, it muſt be in this reſpect, *viz.* Becauſe they cannot put the Cattle of a Stranger into the Common without preſcribing ſo to do. 1 *Roll's Abr.* 396.

Another Objection to the Plea was, That the Lord of the Soil could not make Cony-boroughs, and put Rabbits into the Common.

And to prove this, the Serjeant hath cited *Greſil* and *Hoddiſern's* Caſe, which he informs his Reader to be in point, viz. That the Lord *cannot* put Conies into a Common: And yet in the very next Paragraph he cites the ſame Caſe, as reported by Juſtice *Croke*, and tells us, that the Court was of Opinion, That the Lord of the Soil *might* put Beaſts of Warren into a Common as well as any other Cattle, according as it was adjudged in that very Caſe. 1 *Jones* 12. *Yel.* 143. idem. 2 *Cro.* 195.

Now here he has made thoſe Judges plainly to contradict each other in the Report of that Caſe, when in truth they as plainly agree in the very ſame Thing.

For Juſtice *Croke* reports, That the Lord of the Soil may have Beaſts of Warren in a Common, which is not denied by * *Yelverton*, and both agree, That the Commoner cannot kill them, but that if the Lord ſurcharge the Common, or ſuffer great Numbers of Conies to encreaſe to the Prejudice of the Commoner, he may have an Action on the Caſe againſt him. * 104.

Then it was objected againſt the Plaintiff, That he ought not to traverſe the Defendant's Preſcription to a free Warren, but ſhould have anſwered the Title ſet forth in their Plea, viz. That Cantrell

was ſeized in Fee; for if that is true, 'tis a ſufficient Avoidance of the Plaintiff's Title.

To which it was anſwered, That the Defendants had made their Juſtification in the Right of the Lord of the Soil, to be only an Inducement to this Preſcription for a free Warren, and did not rely on it as they ought, viz. by ſaying, *& hoc parat. ſunt verificare; unde quoad* the putting in the Cattle *petant judicium, &c.* and therefore had given the Plaintiff an Advantage to traverſe that Preſcription.

There are two Books cited as pertinent to this laſt Objection; the firſt which I ſhall mention is,

Cro. Car. 173. Dyer 365. *ſſ. The Earl of Pembroke verſus Baſtock*; it was a *Quare impedit* wherein the Plaintiff ſets forth, That Queen *Elizabeth* was ſeized of the Advowſon in Fee, and that the Church being void, ſhe preſented one *Pindar*, who was inſtituted, *&c.*

That the Queen granted the Advowſon to Sir *Chriſtopher Hatton*, who granted it to Sir *Walter Sands*, under whom the Plaintiff claimed.

The Defendant *Boſtock*, confeſſed that the Queen preſented *Pindar*, but that the Church was then full of another; and that before the Grant under which the Plaintiff claimed, the aforeſaid Sir *Walter Sands* demiſed the Advowſon to *Serjeant More*, under whom the Defendant derived a Title, and traverſed, That the Church was void when *Pindar* was inſtituted; upon which they were at Iſſue.

Now it was objected, That the Plaintiff could never recover upon this Pleading, becauſe the Defendant had made a good Title to himſelf by a precedent Leaſe from Sir *Walter Sands*, which deſtroyed the Plaintiff's Title, and to which he gave no manner of Anſwer.

This was admitted to be ſo, if the Defendant had relied upon it; for then the Plaintiff muſt have given ſome Anſwer to it; but he made it only as an Inducement to his Traverſe, and in ſuch Caſe the Plaintiff could not take a Traverſe upon a Traverſe; and therefore he had nothing to do, but to maintain that which the Defendant had traverſed.

What the Serjeant means by *vide ore pur ceſt darrein point* 4 Vent. c. 271. & 272. I cannot imagine.

It was objected alſo on the ſame Side, That the Sufficiency of Common was not traverſable.

But it was over-ruled, becauſe 'tis a very proper means to know whether the Common was overcharged, and ſo to entitle the Plaintiff to another Action; though in this Caſe it could not be known whether it was overcharged or not, becauſe it was not ſo much as mentioned in the Declaration; for the Plaintiff had only alledged, That by putting in the Cattle, he could not have his Common in tam amplo modo as before; which may be true, and yet the Common not ſurcharged.

Stanton versus *James* Bar.

Paſ. 3 Jac. II. Rot. 361.

London ſſ. CASE against the Defendant late Sheriff of Eſſex; wherein the Plaintiff declared, That Sir Thomas Nightingale was indebted unto him in 100 l. upon Bond, conditioned for payment of 103 l. on a certain Day, which was not paid, and thereupon the Plaintiff implacitaſſet the Obligor upon the ſaid Bond, who for want of an Appearance was outlawed, and a Capias utlagatum iſſued againſt him, which was delivered to the Defendant then Sheriff, who by Vertue thereof arreſted him, and being in Cuſtody he eſcaped.

To ſupply the defect of an Argument (for it ſeems there was none in this Caſe) the Serjeant hath printed his own Obſervations on it.

The firſt Obſervation is, That the Plaintiff had made his Declaration too long, by ſetting forth the Bond and Condition, and ſhewing how the Perſon came to be indebted to him.

'Tis true, it had been a ſhorter way of Pleading to have left thoſe Circumſtances out of the Caſe; but it ſeems ſtrange, that the Serjeant ſhould complain of the Length of a Declaration, who is ſo very voluminous himſelf.

The next of his Obſervations is, That 'tis not long enough, becauſe he had not ſet forth the Original on which he proceeded to the Outlawry; but ſaid implacitaſſet only.

But I find that the Serjeant made this Obſervation only to give it an Anſwer; for he is of Opinion, That the Plaintiff ought not to ſet forth the Original.

Now after all thoſe Remarks, he hath not obſerved to quote the Authorities right; for he tells us, That in Hob. 9. the Declaration begins with ſetting forth the Exigent, when there is not one Word in that Page like it.

Then he cites 2 *Vent.* 281. which, he tells us, was a Plea in Abatement, and that it was quod implacitavit as in this Caſe: But this is a Miſtake, for it was a Plea in Bar; and as for concluding *prout patet per recordum*, the Precedents are both ways.

Laughton

Laughton versus *Ward.*

Winford. Trin. 7 W. III. Rot. 1703.

York ff. CASE wherein the Plaintiff declared, That he was seized in Fee of a Close called Langdale, and so prescribed to have a Way leading from the Highway, in, by and through a Place called Badsley-Well-Lane, to a Place called Langdale-Lane, and from thence to his aforesaid Close of Langdale, and that the Plaintiff had spoiled Badsley-Well-Lane with his Carts and Carriages, that the Way was of no use to him.

The Defendant pleads in Bar, That William Vescy was seized in Fee of a Close called Badsley-Well-Close, and lays a Prescription in him, &c. for a Way through Badsley-Well-Lane to the said Close, and so back again; and so justified the going thither with Carts, &c.

The Plaintiff replied and confessed, That Vescy had such a Way, but saith, That the Defendant in using the said Way through the Lane to the Close, did go beyond that Close to another Close called Warton Langdales, and so back again, which was likewise beyond his Prescription.

1 Roll's Abr. 391. 1 Mod. 190.

The Defendant rejoined as before in his Plea; and upon Demurrer the Plaintiff had Judgment, because the Defendant having only prescribed for a Way to a Close, he could not justifie the going beyond it.

The Serjeant seldom passes a Case without a Remark of his own, and that which he made here, he tells us, seems to be material, *viz.* That the Plaintiff had alledged that the Defendant had spoiled the Way cum carucis *Suis*, and the Defendant had justified the passing there with the Carts of William Vescy; then he adds a *Quere* of the Consequence of this, which is very easily resolved, *viz.* That 'tis of no manner of Consequence; for the Question is not who had the Property in the Carts, but who spoiled the Way?

Reynolds versus *Hewett.*

Tempest. Mich. 12 W. III. Rot. 594.

Cambridge ff. CASE against the late Rector of Conington for Dilapidations, brought by the Plaintiff, who was present Rector thereof, setting forth, That the Defendant Resignasset the Church, That the Plaintiff was inducted and fuit legitimus

gitimus & proximus ſucceſſor; That the Parſonage Houſe was out of Repair, which would coſt 100 l. &c.

The Objection to this Declaration was, That the Reſignation was not well alledged; for it was reſignaſſet generally, when it ſhould be into the Hands of the Biſhop.

But it was anſwered, That where a Man claims an immediate Title upon a Reſignation, there may be ſome Reaſon for alledging that it was in manus Epiſcopi; but 'tis otherwiſe where the Reſignation is only ſet forth by way of Recital.

In Raſtal's Ent. 404 b. the Reſignation is ſet forth to be in manus Epiſcopi. Raſt. Entr. 519. a.

The Miſtake is in the Folio, for there is nothing of Reſignation in that Leaf.

The Serjeant hath cited in the Margent, *Dyer* 293. where the Caſe was thus. *ſſ.* One *Townſend* was preſented to a Living, and being a *Layman*, and no Sentence of Deprivation againſt him in a Year after the Death of the laſt Incumbent, the Archbiſhop preſented one *Pickering* by Lapſe, without any Notice given to the right Patron of the Incapacity of *Townſend*. Thereupon *Bedingfield*, the Patron, brought a *Quare impedit* againſt the Archbiſhop, and *Pickering* the Incumbent; and there being a definitive Sentence in the Arches againſt *Townſend*, the ſaid Patron ſet forth his Title to preſent upon an Avoidance by *Deprivation*, *&c.* An Exception was taken to the Declaration, becauſe the Patron had not ſhewed *before what Judge* the ſaid *Townſend* was deprived.

Now to make that Caſe applicable to this, it muſt be thus argued. *ſſ.* If it was neceſſary to ſet forth *before what Judge* the Incumbent was deprived, 'tis as neceſſary to ſet forth *to whom* this Reſignation was made.

But the Objection was not allowed in that Caſe in *Dyer*; and yet the Court was of Opinion in the Principal Caſe, That the Declaration was ill, becauſe the Plaintiff did not ſet forth the *Reſignation* to be *in manus Epiſcopi*.

This ſeems to be ſuch a Nicety, that I wiſh the Serjeant did not miſtake the Opinion of the Court; for a *Reſignation* muſt be into the Hands of the Biſhop, or 'tis void; and if ſo, then admitting it was made to any Body elſe, How could the Plaintiff be *legitimus & proximus ſucceſſor*? As he did alledge himſelf to be.

Now the Reaſon why all Reſignations muſt generally be intended to be made to the Biſhop is, Becauſe the Care of the Dioceſe naturally belongs to him, and he hath the Ordinary Juriſdiction there.

'Tis true, he may delegate ſome part of his Power to Chancellors, Officials, or Commiſſaries, *&c.* but yet as to Reſignations, the Law only takes notice of him.

But 'tis as true, that ſome Deans and Chapters have Power, either by Preſcription or ancient Compoſition, to grant Inſtitutions, and by conſequence to admit *Reſignations* within certain Precincts of exempt Juriſdiction: So likewiſe in Caſes of Donatives, where Admiſſion and Inſtitution is not neceſſary, the Reſignation muſt be to the Donor.

But when the Law takes Notice of the Biſhop alone to be the proper Perſon to whom a Reſignation muſt be made, why muſt it be intended that it ſhall be in an exempt Juriſdiction, or in a Donative, any more then where a Plaintiff declares that Adminiſtration was committed to him by a Biſhop, without ſaying *loci iſtius ordinarium?* For he may not be Ordinary of the Place, becauſe there may be many Peculiars and Donatives in his Dioceſe; but it ſhall never be intended that he was not Ordinary, *&c.* becauſe he hath a general Juriſdiction over his whole Dioceſe.

After all, I do not find that the Serjeant was ſatisfied with this Judgment, for he hath cited two Caſes to the contrary.

Hill. 15 *Jac.* 1. *Rot.* 474. ſ. *Salkard verſus Beckwith*, which was the like Action as this for Dilapidations; wherein the Plaintiff declared that the Defendant *vicariam libere reſignaſſet*, and he had Judgment.

Hill. 7 *W.* 3 *Rot.* 1362. ſſ. The other is between *Kingford* and *Lloyd*, but that is nothing to this purpoſe; it was an Action for Dilapidations brought by the Plaintiff, not upon a *Reſignation*, but upon an Avoidance, by taking a ſecond Living with Cure, *&c.*

Blockley verſus *Slater.* *Cooke.*

Hill. 4 & 5 W. & M. Rot. 1421.

Shropſh. ſſ. CASE, &c. againſt the Defendant for diſturbing the Plaintiff in his Way, ſetting forth, That 1°. Maii, &c. & diu antea & continue extunc poſtea hucuſq; & adhuc, he was poſſeſſed of an antient Meſſuage, and that he ought to have a Way from thence, in, by and through the Cloſe of the Defendant, called Great Goſty Leaſows, to the highway; That the Defendant had made a Hedge croſs his ſaid Cloſe, ſo that the Plaintiff could not paſs, &c.

Upon a Demurrer to this Declaration it was objected, That it ſet forth that the Defendant was poſſeſſed (I ſuppoſe it ſhould be the Plaintiff) and doth not ſay for Years.

Then as to the Regiment of Adverbs, it was ſaid, That it was impoſſible the Plaintiff ſhould be diſturbed if he had the Way antea & continue poſtea.

And laſtly, That there was a great Difference where a Way is claimed in the Lands of another, and where a Man declares upon his Poſſeſſion againſt a Wrong-doer; for in the firſt Caſe he muſt ſet forth his Title to the Way, either by Grant or Preſcription; but in the other Caſe he need only declare upon his Poſſeſſion, and that viam habere debuit without ſhewing any Title.

Now

Now to maintain this Diſtinction, the Serjeant refers us to the Caſe of *St. John* and *Mopdy*, as reported in *Keble*, but more ſenſibly in other Books. 3 *Keb.* 529.

ſſ. The Caſe was thus, (but not as reported in *Keble*) *viz.* The Plaintiff was ſeized in Fee of a Wood, and the Defendant, to hinder him from the Profit thereof, did dig a Ditch in his own Cloſe, over the Plaintiff's Way, leading from his Wood to *D.* which Way the Plaintiff alledged, that he *de jure habuiſſe debuit*, for the neceſſary Uſe of his Wood. 2 *Lev.* 148.

Upon Not guilty pleaded, the Plaintiff had a Verdict; and it was moved in Arreſt of Judgment, that the Plaintiff had ſhewed no Title to the Way, or that he was at any Time poſſeſſed thereof; but it was held, that *de jure habuiſſe debuit* was a good Title againſt a Wrong-doer; and the Plaintiff had Judgment, which was affirmed in the Exchequer-Chamber.

Slipper verſus *Maſon*.

Winford. Hill. 8 W. III. Rot. 1263.

Norfolk. ESCAPE brought by a Parſon againſt the Defendant, who was a Sheriff, for ſuffering a Perſon to go at large, who was taken upon a Capias Excommunicatum, for not paying Tythes.

Upon Not guilty pleaded, there was a Verdict for the Plaintiff; and it was moved in Arreſt of Judgment.

1. That this Action ought not to be brought by the Party alone, but the King ought to be joined in it, as 'tis always upon an Eſcape after a Capias Utlagatum.

But this was not allowed, becauſe it was contrary to many Precedents where Actions have been brought by the Parties alone upon Eſcapes on a Capias Utlagatum. More 641. Cro. Eliz. 652. & 877. Aſhton's Ent. 32.

2. It was objected, that a Writ of Recaption had been a more proper Remedy than this Action. And for that *F. N. B.* is cited, where it is ſaid, That if a Sheriff ſhall unlawfully deliver a Perſon excommunicated, then if the Biſhop certifies this Matter into the Chancery, there ſhall be a new Writ to the new Sheriff to retake him; and if the old Sheriff continue ſtill in Office, then the Writ muſt be directed to the Coroners. *F. N. B.* 64. *litera B.*

But this Writ of Recaption is ſeldom allowed, but where the Proſecutions are ex Officio, and not ad inſtantiam Partis; and 'tis probable that the Party may never be retaken, and the Party grieved can have no Manner of Recompence for this Injury. Cro. Eliz. 838.

3. The King may Pardon the Contempt, in ſuffering the Perſon to go at large; and if that is pardoned, then the Action is gone of Courſe.

To

To which it was answered, That the Action is not discharged by a Pardon of the Contempt, because, at that very Instant, when the Person escaped, the Plaintiff had a Right of Action vested in him.

4. That the Bishop might absolve him, and in such Case the Action is gone.

There ought not to be any Absolution without Caution parere mandatis Ecclesiæ, which must be actually given before Absolution, and therefore shall never be intended.

5. The chief Objection was, That this Action is founded upon a mere spiritual Matter, and therefore ought not to be allowed; but that the Plaintiff ought to have his Remedy in the Spiritual Court.

The Answer was, ſi. 'tis true, the original Matter was Spiritual, but after the Excommunication, the Process issues out of a Temporal Court; 'tis directed to a temporal Officer, and executed by him, and 'tis for an Escape, which is a temporal Injury, and the consequential Damages upon it are likewise temporal.

So the Plaintiff had Judgment; and this was the first Action which was ever brought upon an Escape after a Capias Excommunicatum.

The Serjeant hath cited several Cases to maintain this Judgment, which he hath jumbled together in a confused Manner, some of which prove that an Action on the Case will lie where a temporal Injury arises upon a spiritual Matter.

F.N.B. 47 *H.* And in the first Place the Opinion of *Fitzherbert* was cited, *ſſ.* That an Action lies against an Archdeacon for refusing to induce a Clerk after his Admission and Institution by the Bishop, because Induction is a temporal Act; yet he says, there are Opinions to the contrary, *viz.* that he ought to be cited into the Spiritual Court; because the Archdeacon may there alledge such Causes for his Refusal, which cannot be tried in the Temporal Courts; and therefore the Book puts a *Quære* upon this Matter; so that here is only Opinion against Opinion, with a *Quære* annexed, which puts the Matter at large.

Hob. 307. *Cro. Eliz.* 655. In *Hob.* 317, there is not a Tittle to this Purpose: In *Cro. Eliz.* there was a Suit in the Spiritual Court *pro violenta injectione manuum* upon a Clerk; the Defendant pleaded that *molliter manus imposuit, &c.* in defence of his Servant, and so *Son Assault Demesne*: This Plea was refused by that Court, and thereupon *B. R.* granted a Prohibition; for tho' the beating a Clerk is properly triable in the Spiritual Court, yet the Refusal of a proper Plea is a temporal Injury, and therefore the Court was prohibited.

Cro. Eliz. 838. In the same Book 'tis held, that the Excommunication is a spiritual Matter, yet if before the denouncing thereof a Person will blot or raze out one Name, and put in another, an Action will lie for this Injury.

2 *Jones* 132. In *Jones*'s Reports there is a Case of a Churchwarden who was maliciously prosecuted in the Spiritual Court for not accompting, *&c.* and for this he brought his Action; now, tho' the Matter was mere-

ly ſpiritual, yet the Malice was a temporal Injury; and ſo the Action was held maintainable.

So in *Williams*'s Caſe it was held, That a Man may preſcribe to have Divine Service celebrated in a private Chapel, and that an Action will lie by the Lord of the Manor, if the Clerk refuſeth, tho' the Service is a ſpiritual Matter; but 'tis not ſo where 'tis a publick Church, becauſe then every Pariſhioner might have an Action. 5 *Rep.* 72. 1 *Roll. Abr.* 110. *idem.*

But the Court chiefly relied on the Caſe of the Sheriffs of Briſtol, which is reported in ſeveral Books, and they all agreed, That an Action on the Caſe would lie for an Eſcape of a Bankrupt committed by the Commiſſioners. 1 Rol. Rep. 47. Mo. 834. 2 Bulſt. 236.

Jones verſus *Hamond.*

Hill. 13 W. III. C. B.

Kent ſſ. **CASE wherein the Plaintiff declared, That he was poſſeſſed** de quadam pecia Paſturæ, **containing by Eſtimation four Acres, and the Defendant** (but in the Book 'tis the Plaintiff) **was poſſeſſed of another Cloſe,** & de quadam pecia Paſturæ, &c. **and that of Right the Plaintiff ought to have a Way from ſuch a Street thro' the Defendant's Cloſe and** peice of Paſture **to his own peice of Paſture, but was diſturbed by digging a Ditch a-croſs the Way.**

The Plaintiff had a Verdict, but could never get Judgment, becauſe pecia Paſturæ **was very incertain.**

But as incertain as it is, I think *placea terræ* is altogether as bad *Latin*, and as incertain; and yet I find ſuch a Precedent in *Raſtal's Ent. folio* 618. *B.*

ſſ. In Treſpaſs, the Defendant pleaded in Bar that one Man was ſeized in Fee of five Meſſuages, and another of ſix Meſſuages in *S*, and that the *locus in quo, &c.* was *quædam vacua placea terræ*, containing about a Rood, and contiguous to the ſaid Houſes; and ſo preſcribes for a Way from them *ultra placeam præd'* to the Highway.

Neither do I think there is a greater Certainty in that Precedent in my Lord *Coke*'s Entries, where the Plaintiff preſcribed for a Way, *in, ſuper & ultra duas parcellas terræ.*

'Tis true, there are particular Names added to thoſe Parcels, and ſo there are particular Numbers of Acres added to the *peice* of Paſture in the principal Caſe.

Now I cannot help ſaying that the Words *pecia*, *placea* and *parcella*, are *Latin* much alike, and are barbarous enough for any Common Lawyers, but were never yet admitted to a Place in the worſt of Dictionaries, or in the meaneſt *Latin* Author.

3

Crowther versus *Oldfield*.

Winford. Hill. 10 & 11 W. III. Rot. 1077.

ff. CASE for disturbing a Copyholder in the enjoying a Common appurtenant to his Messuage, setting forth, That he was seized of a House and 10 Acres of Land, &c. in N. Parcel of the Manor of Wakefield, which he held by Copy of Court-Roll * in Fee, according to the Custom of the said Manor; but did not say ad voluntatem Domini; and that he had Right of Common in Warmelees, which was Parcel of the said Manor, &c. but was disturbed by the Defendant.

This is a strange Tenure. *Vide* 2 Vol. 1392.

Upon Not guilty pleaded, the Plaintiff had a Verdict, but could not get Judgment, because those Words being left out of the Declaration, it doth not appear but the Plaintiff might have a Fee-Simple at Common Law, and then he should have prescribed in his own Name; whereas he had prescribed that he, as Tenant, and all other Tenants of that Manor, had Right of Common there.

But tho' this was after a Verdict which had found the Custom of the Manor, and that the Lands were Parcel thereof, yet the Judgment was arrested.

'Tis probable that it might have been a good Objection upon a Demurrer to the Declaration, for so in the Case between *Rogers* and *Bradley*, *viz.* In Replevin, the Defendant made Cognizance, setting forth that M. was seized in Fee of a Close, Parcel of the Manor of *L.* which he demised to *R.* for 99 Years; and being seized of the Reversion, *according to the Custom of the Manor*, he surrender'd the same into the Hands of the Lord, *&c. secundum consuetudinem manerii præd'*; and upon Demurrer this Cognizance was held void; for tho' he had alledged that *M.* was seized *secundum consuetudinem manerii*, *&c.* yet these Words *ad voluntatem Domini* being left out, it shall be intended a Freehold, which could not be surrender'd in that Manner without a special Custom.

2 *Vent.* 143.

Cro. Car. 229. So in *Anno* 7 *Car.* 1. a Grant was set forth to a Man and his Heirs by Copy of Court-Roll, *tenendum secundum consuetudinem manerii*; but because it was not said *ad voluntatem Domini*, the Court was of Opinion that it might be intended a Freehold.

In the principal Case the Serjeant tells us, there was a Writ of Error then depending, but what became of it I cannot tell, only thus much I can say, that the like Action was brought in *B. R.* in *Easter* Term 4 *Annæ*, and there one of the Judges held, with great Reason, That the Declaration being against a Wrong-doer need not be so special as where a Title is claimed, and that the Plaintiff having set forth that he is a customary Tenant of the Manor, and that he held his Lands by Copy of Court-Roll; if that is true, he must hold them *ad voluntatem Domini*.

Nicholſon verſus *Smith.*

Winford. Trin. 13 W. III.

Cumberland, ſſ. CASE, &c. ſetting forth, That the Plaintiff was poſſeſſed of an ancient Water-Mill in the Pariſh of Gosforth, called Santon-Mill, and that the Cuſtom of the Manor of Bolton within that Pariſh was, ſſ. That every Tenant dwelling in an ancient Meſſuage, and to which 20 Acres did belong, within the ſaid Manor, did always bring his Corn, yearly growing on the ſaid 20 Acres, and as long as he dwelt in the ſaid Houſe, to this Mill to be ground, &c.

That the Defendant was ſeiſed of an Houſe and of 20 Acres of Land in the ſaid Manor, in which Houſe he dwelt, &c. but did not bring his Corn, &c. to the Mill.

Upon Not guilty pleaded, the Plaintiff had a Verdict, but the Judgment was arreſted, becauſe 'tis contrary to the Nature of a Cuſtom of a Manor, to apply it to one particular Tenant within that Manor.

The Caſes in the Margent are, *viz.* That if a Cuſtom be alledged in a Vill, you cannot apply it to a particular Cloſe within that Vill; as where a Cuſtom of the Vill of *Peplow* was ſet forth to be, that all the Occupiers of a Cloſe there had uſed to maintain a Fence againſt another Cloſe; this was held ill for the Reaſon above-mention'd, unleſs it had been in the Caſe of a Copyholder; for he may apply a Cuſtom in a Pariſh to a particular Place therein, becauſe he cannot preſcribe.

Cro. Car. 418. 1 Vent. 97.

Whitrow verſus *Edwyn* & al.

Tempeſt. Trin. 3 W. III.

Midd. ſſ. ESCAPE, &c. againſt the Sheriffs of London upon mean Proceſs.

The Defendants plead a Reſcous in Bar to this Action.

The Plaintiff replied, That the Perſon eſcaping was arreſted in the Pariſh of St. Andrew in Holbourn, in the County of Middleſex, in which County there is a Priſon called Newgate, to keep Priſoners arreſted for Debt, whither they ought to be carried in ſome convenient Time after the Arreſt.

That

That the Defendants might have carried the Person thither within Half an Hour, but did not carry him in two Days after he was arrested, but kept him in an Alehouse, which was not a Place of Safe-Custody, &c. and that the Rescous was made in the Alehouse, &c.

And upon Demurrer to this Replication, it was held to be all Matter which might be given in Evidence, and upon which no Issue could be taken.

Action

Action on the Statute, and Bar by the Statute.

JUSTICE *Warburton*'s Manuſcript is of ſome Service to the Serjeant upon this Title; but whether it will be ſo to the Reader may be a Queſtion which I ſhall not now determine; but ſhall only take Notice, that in the firſt Caſe under this Title, there is no Account of any Judgment or Reſolution in it, nor in what Court or Term it was pleaded, nor between what Parties.

It is upon the Statute 1 R. 3. cap. 3. for taking away the Goods of a Perſon ſuſpected of Felony, but before Conviction.

The next is upon the Statute 33 H. 8. cap. 9. for keeping an unlawful Gaming-houſe, and ſuffering People to play at Cards; the Penalty is 40s. per diem.

There is another upon the Statute 2 H. 5. cap. 3. againſt the Ordinary, for refuſing to give the Plaintiff a Copy of the Libel.

And there is a Precedent upon the Statute 21 H. 8. cap. 13. of an Information brought againſt a Clergyman for renting a Farm; the Forfeiture is 10l. per Month.

To this Information, which was brought in the Court of Exchequer, the Defendant pleaded in Bar, That he had not ſufficient Glebe for paſturing his Cattle, nor Corn for his Family.

The Plaintiff replied, That he uſed the Farm for the Time mentioned in the Information, and traverſed that the Defendant had ſpent the Product thereof in his Family.

Chapman, qui tam, &c. verſus *Greſham*.

THIS was an Action grounded upon the 17th Paragraph of the Statute laſt mentioned, viz. 21 H. 8. cap. 13. for Non-reſidency upon his Rectory at Donington.

The Defendant pleaded in Bar, That he was a Layman, and traverſed that he was a Clergyman.

To this Plea the Plaintiff demurred; and upon this Caſe the Serjeant has made three *Nota's*.

The firſt is relating to himſelf, *Nota per moy*, by which I ſuppoſe he would have us take Notice that 'tis his Opinion, if a Layman is preſented to a Benefice, 'tis not void, but he is Parſon *de facto*.

Now, if the Serjeant had not cited a better Authority to prove this than his *Nota per moy*, I ſhould not have much regarded it, tho' it had been confirmed by his *Teſte meipſo*.

Dyer 293. But the Caſe in *Dyer* is full to this Purpoſe, *ſſ.* A Layman was preſented, and there being a Year paſt ſince the Death of the laſt Incumbent, the Archbiſhop collated by Lapſe; the Queſtion was, Whether the Preſentation of a Layman was a mere Nullity in its ſelf, or whether there ought to be a Sentence of Deprivation, and Notice given to the Patron, before the Ordinary could collate by Lapſe? All which muſt be done, if this Layman was Rector *de facto*; and the Court held that he was, and that he ought to be deprived, and Notice given to the Patron, *&c.*

His next Obſervation is, *ſſ.* That 'tis all one and the ſame Thing, where a Parliament is ſaid to be inchoat' ut tenit. This I muſt confeſs to be a very extraordinary Remark; as if a Parliament could not be begun in one Place, and held by Prorogation or Adjournment in another.

Then he takes Notice of ſome Precedents where this Statute was miſrecited, *ſſ.* Where it was ſet forth to begin at *Weſtminſter*, when in Truth it began at *London*; and the firſt Caſe cited is between *Tricket* and *Bond*, the Record of which Caſe the Serjeant himſelf peruſed, and tells us, that 'tis little to the Purpoſe: Why then did he cite it?

Hil. 8. *W. III. Rot.* 1068. *C. B.* The next is between *Burt* and *Rothwell*, where the Statute was miſrecited in the ſame Manner as before, and the Plaintiff had concluded his Declaration thus: *ſſ. Contra formam Statut' præd'.* And though he had a Verdict, he could never get Judgment, becauſe of the Miſrecital; which may be true for ought I know, but 'tis contrary to ſome Caſes in our Books, where 'tis held, that a Miſ-

Dyer 95. *Yel.* 127. recital of a Statute is cured by a Verdict.

Then he tells us, That the Court ſaid, the true Way of Pleading this Statute was in my Lord Coke's Entries: But it would have ſaved me ſome Pains if he had told in what Page, or under what Title it was to be found.

'Tis recited three Times in that Book, and in all thoſe Places it be-

Co. Ent. 368. *B. Pl.* 7. 493. 511. *B. Raſt.* 599. *B.* gins thus, *ſſ. Cum in Statut' in Parliamento tent' apud Weſtm'*, without ſetting forth where it began, for in Truth that was in *London*; but it was held by Prorogation at *Weſtminſter*.

But the Serjeant tells us of a better Way yet to plead this Statute, *viz.* That becauſe it was made at a Seſſion held by Prorogation, the Plaintiff ſhould ſay, *ad Seſſionem* of the Parliament, held on the firſt Day to which they were prorogued, and not *ad Parliamentum*

2 *Cro.* 111. generally, becauſe in Judgment of Law every Act relates to the firſt Day of the Sitting of the Parliament.

Malabar versus *the Inhabitants of* Lakenheath, &c.

Trin. 33 Car. 2. B. R. Rot. 18.

Suffolk, ss. THIS was a long Case upon W. II. cap. 46. for throwing down Fences in the Night-time, which the Plaintiff had set up for the Improvement of his Waste; the Proceedings were thus:

ss. A Writ issued out of the Chancery, directed to the Sheriff of Suffolk, commanding him to inquire, by the Oath of lawful Men, what Persons had pulled down the Fences of one Malabar, at Mildenhall, in the Night-time.

The Sheriff returned an Inquisition, by which it was found, That certain wicked Persons, to the Jury unknown, did with Force, &c. in the Night-time, throw down 600 Perches of Hedge, &c.

Thereupon a Distringas issued out of the Crown-Office, directed to the Sheriff, in which the former Writ, Inquisition, and Finding of the Jury were recited; and by this Writ he was commanded to distrain the adjoining Vills to set up the Fences again at their own Charge, and to inquire what Damages the Plaintiff had sustained, &c.

The Sheriff returned Issues upon the Inhabitants of the adjoining Vills; ss. de exitibus of the Inhabitants of Lakenheath 10 l. and so on to the rest; and as to the Damages, he returned that the Plaintiff was damnified 45 l. 9 s. 2 d.

The Inhabitants of the respective Vills appear and pray Oyer of the Writ of Enquiry, and of the Return and Distringas; and then, Protestando that they are not compellable by those Writs to make up the Fences, nor to satisfy the said Damages, and that the greatest Part of the said 600 Perches was not thrown down, and that Malabar was not damnified so much, they plead quoad prostrationem, &c. that Mildenhall was an ancient Manor, and that the said Fences were in a Field called Wellsprings, Parcel of the said Manor, that Sir Henry North was seised thereof in Fee, and that Time out of Mind there have been some freehold Tenements in Mildenhall held of the said Manor by certain Rents and Services.

That within Mildenhall there are two other Manors, viz. Thambill and Arpalls, but are both held of the said Manor of Mildenhall, and that there are several ancient Houses held of those Manors by Rents and Services.

That in Mildenhall there are also several ancient Copyhold Houses, and that there is one Copyhold Messuage in the Manor of Arpall; and so lay a Prescription in the Tenants of those Houses, as well Freehold as Copyhold, to have solam & separalem Pasturam in Wellsprings.

That

That the Fences were built there ſo that they could not enjoy their Paſture, and that the Plaintiff ſuſtained 5 l. Damages, which they tendered to him, and traverſed that he was damnified any more.

The Plaintiff replied and confeſſed the Seizin of Sir Henry North, and that Wellſprings is Parcel of the Manor of M. and that the other Manors were held thereof; but that Sir Henry North enclosed 20 Acres of Wellſprings, and made a Feoffment thereof to Malabar, the Plaintiff, by Virtue whereof he entered; and to traverſed the Preſcription alledged in the Inhabitants, both as to the Freehold and Copyhold Meſſuages.

The Defendants rejoin and take Iſſue upon the Traverſe, and this found againſt them.

The Serjeant tells us, That he has ſeen a Draught of a Writ of Execution upon this Judgment, reciting all the Matter before-mentioned, (which at length is about 12 Pages) except the firſt Writ to the Sheriff, and this he acknowledges to be a long and tedious Hiſtory to no Purpoſe: If ſo, I would fain know, why he has printed *Micoe*'s Caſe, *fo.* 169, which is a longer Caſe upon this very Subject?

Now the Draught of this Writ, by the Character he has given of it, ſhould be his own; for one may eaſily ſee by his Volumes that he has no very conciſe Way of Writing.

But it ſeems this long Draught was peruſed and corrected by a little Man, *viz.* by the Lord Ch. J. *H.* and made much ſhorter, which gave our late Judge a very apt Occaſion to quibble upon the Writ thus corrected, by ſaying that now it was *un breiſe* indeed.

He tells us further, That the Learning in ſuch Caſes being ſomething antiquated and obſcure, he will for that Reaſon inform his Reader in every Particular which he hath collected out of the Books relating to it.

And now we are to expect ſome curious and uncommon Learning, methodically digeſted out of the many Volumes of the Law, but out of none bigger than his own.

And after all, when we find that this Learning amounts to no more than a few Gleanings out of two Caſes in *Sid.* one in *Lev.* and another in *Coke*, I think I may very well affirm, that take it all together, 'tis a Piece of impertinent Prolixity, which he promiſed in his firſt Page to avoid.

He obſerves, That the Plaintiff had Judgment not for the Damages aſſeſſed by the Jury who tried the Iſſue, but that nullo habito reſpectu to thoſe Damages, he had Execution for the Damages found by the Inquiſition; which he obſerves might not be ſo proper for him to take, becauſe they were aſſeſſed before the Defendants appeared; and the Inquiſition was only to aſcertain what Iſſues ſhould be charged: 'Tis no more than an Inqueſt of Office, and was never yet intended to be concluſive to any one who had a Right, becauſe no Attaint will lie againſt ſuch a Jury.

Beſides,

Beſides, the Defendants might have pleaded to the Right upon the iſſuing of the Diſtringas, and therefore ſhall never be tied up to thoſe Damages which were found by the Inquiſition.

Theſe are the Reaſons alledged, and I cannot ſay but they are plauſible enough, if there had been Occaſion for this Obſervation; but to what Purpoſe is the Serjeant ſo nice an Obſervator in this Matter, when the Damages found upon the Inquiſition, and by the Jury at the Aſſizes, are the ſame?

'Tis true, if leſs had been found by one Jury than by the other, it might have been worth the Serjeant's Obſervation, if the Plaintiff had relinquiſhed the greater, and taken the leſs.

But notwithſtanding this Remark, the Plaintiff took out a right Execution, becauſe the Matter to be tried at the Aſſizes did not relate to the Damages, but whether the Fact was done in the Night-time or not? And if it was done noctanter, yet if any of the Perſons could be known, the Offence was not within this Statute; becauſe the Party grieved might have an Action of Treſpaſs, and the Statute gives a Remedy only where the Parties are not known. 1 Lev. 108. 2 Inſt. 476.

Then he objects, That if the Damages found by the Inquiſition were exceſſive, the Defendants had no Remedy.

But the Anſwer was, They had a proper Remedy; for when they plead to Iſſue, they might take the Exceſs of thoſe Damages by Proteſtation, and then alledge that the Plaintiff was damnified ſo much. And to prove this, he cites a Caſe in * *Sid.* which is ſo in Point. * 1 Sid. 212.

In the next Paragraph the Serjeant is an implicite Tranſcriber of my Lord *Coke*'s Opinion out of *Roll*'s Reports; and 'tis only what that Oracle of the Law ſaid *obiter* in *Mallery*'s Caſe, *viz.* That he had ſeen an ancient Reading upon this very Statute, where it was held, that the neighbouring Vills ſhall have a *Year and a Day* to *indict* the Offenders; and that if 'tis not done within that Time, yet thoſe Vills ought not to be *indicted* upon this Statute, *to repair* the Fences; but the Party grieved ſhould bring his Action againſt the Inhabitants, *&c.* as he who is robbed doth, upon the Statute of *Winton.* It was the Opinion of my Lord *Rolle*, that this was good Law, and he tells us, my Lord Chancellor *Bacon* was of the ſame Opinion.

Now 'tis probable my Lord *Coke* ſaw this ancient Reading after he had wrote the * Expoſition upon this Statute; for he doth not mention it there; but yet he was of Opinion that an Action ought to be brought againſt the Vills, and that the Judgment ſhould be, that they ſhall repair the Hedges at their own Coſts, and likewiſe yield Damages, *&c.* * 2 Inſt. 477.

'Tis true, he mentions the Statute of *Hue and Cry* there, but 'tis to another Purpoſe, *viz.* By the Statute of *W. II.* if the adjoining Vills do not indict the Offenders at the King's Suit, either for a Riot or a Treſpaſs, then they ſhall be diſtrained to make up the Fences at their own Coſts. *W.* II. *cap.* 46.

Now here is no Time limited when the Offenders ſhall be indicted; and in ſuch Caſe my Lord *Coke* agrees with this ancient Reading, that it muſt be a Year and a Day, becauſe that is the uſual Time limited by the Law; and that it had been ſo upon the Statute of *Winton*, if a ſpecial Proviſion had not been made that the County ſhould have no longer than 40 Days to take the Robber; ſo that if he is not taken within that Time, the Party grieved may proceed againſt the Hundred, and not wait till a Year and a Day are expired; which they muſt have done, if that Proviſion had not been made.

But this diſagrees with what the Attorney General *Banks* ſaid in the Caſe of the * King and Inhabitants of *Epworth*, *viz.* That he had ſeen the Reſolutions in 12 *Jac.* which I ſuppoſe muſt be in *Mallery*'s Caſe, for it was near that Time; and 'tis common for Reporters to miſtake a Year or two; as in this very Caſe, my Lord *Rolle* reports it to be *Anno* 14 *Jac.* and my Lord *Hobart* reports the ſame Caſe to be *Anno* 15 *Jac.* but *Banks* ſaid, that it was not that the Vills ſhould have a Year and a Day to indict the Offenders, but a convenient Time only.

Cro. Car. 440.

1 *Rol. Rep.* 365.
Hob. 138.

Story verſus *Pleaſaunce*.

Winford. Paſ. 2 Jac. II. Rot. 683.

York, ſſ. THIS was an Information againſt the Defendant, ſetting forth, That 9 Aug. 34 Car. 2. &c. and for ſix Months then laſt paſt, he had been chief Baily of the Honour of Pickering, and executed all Writs within that Liberty; but had not received the Sacrament, nor ſubſcribed the Declaration according to the Act 25 Car. 2. and ſo prayed debitum legis proceſſum againſt the Defendant, and that habere valeat 500 l.

The Defendant pleads in Bar, That after the ſaid Act, and before the firſt Day of Auguſt therein mentioned, he had taken the Oaths of Allegiance, and Supremacy at a Quarter-Seſſions in Yorkſhire, and ſubſcribed the Declaration; but did not ſay prout patet per recordum, but ſaid that he did not then live in London, nor within thirty Miles thereof.

The Plaintiff replied, That he did not take the Oaths before the firſt Day of Auguſt; and upon Demurrer to this Replication, the Defendant had Judgment.

But the Serjeant cannot tell for what Reaſon; however, he has obliged the World with ſome Notes, which he thinks may be of Uſe.

Now, for the better underſtanding this Caſe, there are two Paragraphs in the Statute 22 Car. 2. to be conſidered.

1. The firſt is, That all Perſons in Office, and reſiding in *London*, or thirty Miles thereof, the firſt Day of *Eaſter* Term 1673, or during that Term, ſhall, before the End of *Trinity* Term next following,

ing, take the Oaths in the Courts at *Weſtminſter*; but if not then, they muſt take them before the firſt Day of *Auguſt* following, in the Seſſions of the County where they reſided on the 20th of *May* before.

2. The other Paragraph is, That he who ſhall be admitted to any Office *after* the firſt Day of *Eaſter* Term, and ſhall reſide in *London*, or within thirty Miles thereof, muſt take the Oaths at *Weſtminſter* the next Term afterwards; and if not there, muſt then take them at the Quarter-Seſſions for the County where he ſhall reſide next after ſuch Admittance.

Now the informer had not brought the Offence within either of theſe Paragraphs; for he alledged, That the Defendant 9 Aug. 34 Car. 2. and for ſix Months laſt paſt, and next following, ex tunc hucuſque was in Office: Which, the Serjeant ſays, may be true, if he had been in Office before the firſt Day of Eaſter Term, and after that Term.

This is not eaſily to be apprehended; for if a Man is in Office before *Eaſter* Term 25 *Car.* 2. (for that is the Term intended) muſt it therefore be true, or doth it follow, that he ſhould be in Office nine Years afterwards, *viz.* in *Auguſt*, 34 *Car.* 2?

Muſt not the ſix Months *laſt paſt and next following* relate to that very ninth Day of *Auguſt*, 34 *Car.* 2? And is it poſſible in common Underſtanding to be extended to any other Day or Time? Was not that ninth Day of *Auguſt* long after *Eaſter* Term, 25 *Car.* 2? So that if he was in Office then, and did not take the Oaths, he was certainly an Offender within the Act.

'Tis true, there is a general Allegation, That he not regarding the Act, *nunquam cepit Sacramenta, &c.* Now if this could rationally be intended to relate to the Time before the Defendant was in any Office, or before *Eaſter* Term, 25 *Car.* 2. then the Serjeant's Remark might have been pertinent.

But when the Subject Matter was wholly concerning an Office, which the Defendant exerciſed ſix Months *next before* the *ninth Day of Auguſt*, *Anno* 34 *Car.* 2. and ſix Months *next following*, and *extunc hucuſq;* (which muſt be to the Time of exhibiting of the Information) and that *nunquam cepit Sacramenta, &c.* I would fain know, whether any Thing elſe can be meant by thoſe Words, than that he had not taken the Oaths at the next Quarter-Seſſions after the ninth Day of *Auguſt*, at which Time it plainly appeared he was an Officer?

The Serjeant tells us, That the Plaintiff ſhould have alledged That the Defendant took an Office upon him on ſuch a Day, and that he had not taken the Oaths at the Time and Place required by the Statute; and that he ought expreſly to aver, That the Defendant had exerciſed the Office after he had neglected to take the Oaths, otherwiſe he incurs no Forfeiture.

It was objected againſt this Information, that the Plaintiff prayed Proceſs againſt the Defendant, quod ipſe habere valeat 500 *l.* when it ſhould be, per quod Actio accrevit eidem the Informer.

But he thinks that would have made the Information wrong; because no Action doth accrew for the Forfeiture before the Party is convicted upon an Indictment, &c. for not taking the Oaths, and executing his Office after the Time limited for that purpose.

23 Eliz. c. 1. And this appears by the different penning the Statutes 23 Eliz. and this Act; for in that Statute of Queen Elizabeth, the Offender may be convicted of the Offence in the very same Action by which the Forfeiture is demanded: The Words are, viz. he that absents from Church and being thereof lawfully convicted, but doth not say how: But this Statute tells us how, *viz.* by Information, Presentment or Indictment; And then and not before, he forfeits 500 l. to be recovered by him who will sue for the same; so that the Conviction of the Offence must necessarily precede the Action for the Forfeiture.

As to the Plea in Bar, without doubt 'tis ill; for though he alledged, That he took the Oaths before the first Day of August, 25 Car. 2. yet it doth not appear by the Plea, that he was then an Officer; and 'tis certain that the Intention of the Law is, That the Oaths should be taken in respect of the Office.

Lastly, it seems requisite, That the Defendant should have concluded his Plea prout patet per recordum; because the Act enjoins, That the taking the Oaths shall be recorded at the Sessions; and such a Record is allowed to be good Evidence of every Man's Conformity.

Gay versus *Welch.*

Belvin. Hill. 2 & 3 Jac. II. Rot. 520.

Devonsh. ff. DEBT upon the Statute 5 Eliz. for using a Trade, not being Apprentice to it for seven Years: Upon Not guilty pleaded the Plaintiff had a Verdict, and it was moved in Arrest of Judgment, That this Action ought not to be brought in the Courts at Westminster, but an Information in the proper County; and this by the express Words of the Statute 21 Jac. 2. cap. 4. *viz.* That Offences against Penal Statutes shall be prosecuted, tried, recovered and determined by Information or Indictment, at the Assizes or Sessions, in that County wherein such Offences were committed, and not elsewhere.

The Serjeant hath jumbled many Cases together, some before the Statute, and some after, which I shall divide as followeth.

ff. It was generally held before this Statute, That where an Offence is created by an Act of Parliament, which was not so at Common Law, and the Penalty was appointed to be recovered *in any Court of Record by Action of Debt*, &c. there it must be in one of the Courts

of Record at *Weſtminſter*, and not elſewhere; ſo is *Dyer* 336. and *Cro. Eliz.* 737.

About three Years after the making this Statute, *Doderidge* and two other Judges held, That *B. R.* was not reſtrained by this Act; but that an Action on a Penal Law, might be brought there, becauſe that Court was not *named*. *Latch* 192.

Neither is it material to *name it*, for that Court and all other Courts at *Weſtminſter*, are reſtrained by the Negative Words in the Act, *viz.* It ſhall be brought at the Aſſizes or Seſſions, and *not elſewhere*.

In *Style* 210. The Court was of Opinion, That the Defendant might remove an Information out of any County into the Courts at *Weſtminſter*, notwithſtanding this Statute; for it was made in the Behalf and for the Eaſe of Defendants; but that an Informer could not compel the Defendant to appear out of the County. *Style* 223.

In *Sid.* 400. it was held, That an Action of Debt would lie upon a Penal Statute in *B. R.* for the Act 21 *Jac.* intended only to prohibit Informations and Indictments to be brought there for ſuch Offences.

All the Caſes beſides thoſe which I have already mentioned, are either miſtaken or miſrecited.

Sſ. Raym. 344. and *Style* 353. are miſ-recited; in 3 *Inſt.* 193. there is nothing to this purpoſe, nor in 4 *Inſt.* 65. and in *fol.* 173 of the ſame Book, there is only a Recital of the Statute and no more.

The principal Caſe was not adjudged, but thought worthy to be ſettled in the Exchequer-Chamber; for there had been Variety of Opinions in it, ſo that it ſeemed to be *vexata quæſtio*, and the laſt Reſolution was *Anno* 34 *Car.* 2. in *B. R.* where it was held by that Court, upon Conference with other Judges, That the Statute 21 *Jac.* did not extend to an Action of Debt; which is agreeable to the Judgment in *Sid.* viz. That Debt upon a Penal Statute might be brought in that Court notwithſtanding that Act; becauſe an Action of Debt could not be brought before a Judge of Aſſize, but it muſt be commenced in one of the Courts at *Weſtminſter*.

Read verſus *Jones*.

Winford. Paſ. 3 Jac. II. Rot. 544.

Midd. ſſ. DEBT upon the Statute 8 Eliz. by which 'tis Enacted, That where a Latitat is ſued out of B. R. or any Proceſs out of the Marſhalſea, or in any Court in London, or in any City or Town Corporate, or other Places where they uſe to hold Plea in Debt, Treſpaſs, and other perſonal Actions, and the Defendant appears or gives Bail, and if the Plaintiff doth not declare

against him within three Days afterwards, then the Defendant shall recover Damages.

Then follows the Paragraph upon which this Action is brought, viz. If any Person shall maliciously cause or procure another to be arrested, to answer in any of the said Courts, at the Suit of any Person, without his Consent, that then the Offender being convicted by Indictment, Presentment, or Oath of two Witnesses, or other due Proof, shall be imprisoned for six Months without Bail, and shall not afterwards be set at Liberty without giving the Party grieved treble Damages; and shall likewise forfeit to such Person, in whose Name, or at whose Suit, the said Arrest was made, the Sum of ten Pounds.

Then the Plaintiff sets forth, That the Defendant prosecuted a Capias against him out of the Court of Common Pleas, in the Name of one Howes, and without his Consent; and that he was thereupon arrested, and put in Bail, and so brings his Action for the treble Damages.

Upon Nil debet pleaded the Plaintiff had a Verdict, and it was moved in arrest of Judgment,

1. That the Statute was misrecited; for after the several Courts are named, the Statute mentions other Places where Pleas are held in Debt, Trespass, and other personal Actions, and the Declaration only mentions personal Actions generally, without enumerating the particular Actions, as Debt, Trespass, &c.

2. It was said, That an Attorney (for so was the Defendant) was not within this Statute.

But certainly he that made this Objection was but in jest, for if Attorneys should not be within this Statute, I would fain know who should?

The Serjeant was clearly of Opinion that they were, but he did not care to speak out, and give his Reason in Words at length, but only said, *causa patet*; that is, Attorneys are more likely than any other Set of Men, maliciously to prosecute Writs against Persons in the Names of other Men, and without their Consents.

3. That this Action will not lie before Conviction.

This might have been true, if the Statute had said, That the Offender being *convicted* (not shewing how or in what manner) shall forfeit treble Damages; or if it said, The Offender being *convicted by Information, Presentment or Indictment*; in such Case the *Conviction* must be by one of those Methods before the Action could be brought.

But here the Conviction is to be by Indictment, Presentment or Oath of two Witnesses, *or other Proof*, which may be as well in the same * Action as by any other collateral Proof.

* 2 *Cro.* 188.

But the Defendant had Judgment, because this was a Prosecution upon a Capias out of the Common Pleas, which Court was not named in the Statutes.

Whitgreave

Whitgrave verſus *Chancey*.

Tempeſt. Hill. 10 & 11 W. III. in C. B.

INDEBITATUS aſſumpſit & inſimul computaſſet for 100*l.* won at Dice, which he promiſed to pay.

As to the ſecond Promiſe, viz. upon the Accompt, &c. the Defendant pleaded Non aſſumpſit, and thereupon they were at Iſſue; and as to the firſt Promiſe, he pleads in Bar the Statute of Gaming, and upon Demurrer to this Plea

The Queſtion was, Whether an Action of Debt would lie for Money won at Play? And it was held it would not, but that the Plaintiff ought to declare in ſuch Caſes Specially.

The Serjeant tells us, Several Caſes were cited in proof of this Judgment, but mentions none in particular; which is a very ſafe way to prevent falſe Quotations: 'Tis true, he cites 3 *Keb.* 671. but as that Reporter is often miſtaken himſelf, ſo the Serjeant hath in this Place miſtaken him, *viz.* It was an Action for Debt on a Bond, *&c.* the Defendant pleaded the Statute of Gaming, and ſets forth, That he loſt 90 *l.* to the Plaintiff at Dice, and at the ſame Time he loſt 30 *l.* to *A.* and 60 *l.* to *B.* And upon Demurrer to this Plea, the Defendant had Judgment; but the Queſtion was not, Whether an Action of Debt would lie for Money won at Cards? but, Whether the Statute ſhould extend to 100 *l.* loſt at the ſame Time to ſeveral People? or, Whether it muſt be loſt to one ſingle Perſon? And it was held, That the Statute being made to ſuppreſs exceſſive Gaming, ſhall be extended as far as poſſible for that purpoſe.

Blackwell verſus *Asdill*, & al.

Tempeſt. Trin. 11 W. III. in C. B. Rot. 1587.

Lincoln ſſ. TRESPASS for taking away two hundred Pair of Shoes, bought by the Plaintiff to Stamford Fair, to be ſold.

The Defendants, as to thirty ſix Pair, plead Not guilty, and as to the reſt they plead in Bar the Statute of 1 Jac. 1. cap. 22. That the Mayor of Stamford appointed the Defendants to be Searchers and Sealers of tanned Leather, which they did; and that upon View of the Shoes, they found them made of Leather not well tanned; whereupon they ſeized them, and gave Notice thereof to the Mayor, who likewiſe appointed ſix Triers; and they upon their Oaths tried

tried the ſaid Shoes, and found them made of Leather ill tanned, and not well wrought: And this was held a good Plea.

Sir *Henry Gough* verſus *Bateman* & al'.

Warwickſh. ſſ. CASE, &c. againſt the Defendants, who were Bailiffs of the Borough of Tamworth, for a Falſe Retorn of Members to ſerve in Parliament, ſetting forth, That by the Statute 7 & 8 W. 3. all Falſe Retorns are prohibited; and by that Act, Power is given to the Party grieved by ſuch Falſe Retorn, to ſue the Officers or Perſons making or procuring ſuch Retorn; and that he ſhall recover Damages with Coſts, &c.

7 & 8 W. 3. cap. 7.

But the Plaintiff purpoſely omitted the Clauſe immediately preceding.

ſſ. If any Perſon ſhall retorn a Member to ſerve in Parliament, contrary to the laſt Determination of the Houſe of Commons, of the Right of Election for ſuch Place, the Retorn is made void by that Act.

Then the Plaintiff ſets forth the Writ to elect, and that it was delivered to the Sheriff, who made his Precept to the Defendants, which was delivered to them, and that they went to an Election, and that the Plaintiff was duly choſen, but that the Defendants refuſed to certifie it to the Sheriff, and retorned two other Perſons as choſen.

The Defendants plead in Bar, and ſet forth the Clauſe omitted by the Plaintiff as above-mentioned, and farther ſay, That the laſt Determination of the Houſe of Commons, of the Right of Election for Tamworth, was, That it ſhould be in the Bailiffs and twenty four Capital Burgeſſes, and not in the Populacy; and ſay, That thoſe who voted for the Plaintiff were not Burgeſſes, &c. and ſo inſiſt, That the Perſons retorned were duly elected.

I do not find any farther Proceeding in this Caſe.

Margrets verſus *Dell*.

ff. COVENANT againſt an Executor upon a Covenant of his Teſtator, That the Lands, &c. were free from Incumbrances; and he aſſigns the Breach, viz. That there was a Rent iſſuing out of the Lands, payable to King Charles I. which the Plaintiff had paid.

The Defendant pleads the Act of Oblivion, by which all Arrears of Rent were pardoned.

There is neither Year, Term, Number-Roll or Judgment of the Court on this Pleading; only I find the Plea was signed by Serjeant *Pemberton*, which may be a better Authority to print it than our Serjeant had to print Justice *Warburton*'s old Manuscript.

Collingwood versus *Jefferyes*.

Pas. 5 W. & M.

York, ff. DEBT on the Statute 5 Eliz. against an Attorney for forging a Bond; the Plaintiff sets forth the Statute, and that the Defendant had forged a Bond in his Name, which was transmitted into the Exchequer, and Process issued out of that Court against the Plaintiff, who was compelled to appear; and that his Costs came to 20 l. and his Damages to 10 l. and so demanded double, viz. 60 l. which the Defendant had not paid. 5 Eliz. ca. 14. 3 Lev. 398.

There are no Proceedings on this Declaration, and therefore the Serjeant might have spared this Case if he designed it for a Precedent; for we have Precedents of Proceedings on this Statute in *Rastal*'s *Ent.* 359.

Baker qui tam, &c. versus *Duncalfe*.

Winford. Trin. 5 W. & M. Rot. 685.

Kingston on Hull ff. DEBT on the Statute 23 H. 6. brought by an Informer against the Defendant, who was an Attorney, for executing the Office of an Under-Sheriff for two Years together: It was brought by Original. 23 H. 6. c. 8.

The Plaintiff recites the Statute and the Offence, and avers, That the Office of High-Sheriff of the said Place was not inheritable, and that the Defendant had no Estate in the Office of Under-Sheriff.

The Defendant pleads in Abatement, That he was an Attorney of the Common Pleas, and ought not to be sued by Original, but by Bill.

The Plaintiff demurred, and concluded thus, viz. *Petit judicium & debitum pro Domino Rege & sibi adjudicari*, which is the Conclusion of a Demurrer to a Plea in Bar.

And the same Mistake was made by the Defendant in his Joinder in Demurrer, viz. *Petit judicium & quod pred' the Plaintiff ab Actione sua pred' habend' precludatur*, which is likewise a Conclusion in Bar.

But the Question was, Whether an Attorney shall be allowed his Privilege in a Case wherein the King is concerned: And as to that, this Distinction was made.

1. Where the Proceedings are merely at the King's Suit, as upon Indictments and Informations brought by the Attorney General; in such Cases Privilege shall not be allowed.

But where the Action is not only at the Suit of the King, but likewise of the Party, (as in the principal Case it is) there he shall have his Privilege; for in such Action the Party may be nonsuited: 'Tis an Action which doth not abate by the Demise of the King, as an Original doth which is brought by two, and either of them dies pending the Suit; neither is the Party barred if the Attorney General should enter a *non pros*.

Cro. Car. 10. Hut. 82. idem. 1 Leon. 119. Cro. Eliz. 138. idem. 3 Inst. 194. 1 Vent. 137.

Then as to the improper Conclusions of the Demurrer and Joinder, 'tis not material; for notwithstanding these Conclusions are in Bar when they should be in Abatement, yet the Judgment shall be *quod respondeat ouster*.

Sedgwick versus *Richardson*.

Mich. 5 W. & M. Rot. 400.

London, ss. DEBT upon the Statute 31 Eliz. for selling two Horses in Smithfield without paying Toll.

31 Eliz. cap. 12. 3 Lev. 374.

Upon nil debet pleaded, the Plaintiff had a Verdict for 10*l.* which is the Penalty in the Statute, viz. 5 *l.* for each Horse; and the Jury likewise gave Damages and Costs.

It was moved in Arrest of Judgment, That the Plaintiff ought not to have Costs, because it was a Prosecution upon a Penal Statute, where a certain Forfeiture was given, and the Plaintiff ought to have that and no more.

Cro. Car. 559. 560. 1 Jones 447. 1 Rol. Abr. 579. idem.

And upon the Debate of this Matter, the Distinction in *North* and *Wingate*'s Case was insisted on, viz. Where a Statute gives a certain Penalty *to the Party grieved*, to be recover'd by Action, &c. there 'tis a Debt vested in that Party immediately upon committing the Offence; and if 'tis not paid on Demand, the Plaintiff shall recover *Costs* in the Action; because the Debt being thus due, he ought to have Damages for the detaining it; and where Damages are, there must be *Costs*.

But

But whether the Forfeiture is certain or not, if 'tis given to a *common Informer*, and not to the *Party grieved*, there ſhall be no Coſts, but he that ſues ſhall recover the Forfeiture and no more; and this Diſtinction was allowed by the Court. 1 *Brownl.* 66. *Hut.* 22. idem.

'Tis true, upon the Statute of Forcible *Entries, the Plaintiff ſhall have Coſts, becauſe he might have Coſts at Common Law in ſuch Caſes; and that Statute is not introductive of a new Law, but declaratory of the old. *8 *H.* 6.

Now, tho' the Penalty by this Statute 31 *Eliz.* is given to any common Informer, yet Serjeant *Levinz*, who likewiſe reports this Caſe, tells us, that the Plaintiff had Judgment; but he not diſtinguiſhing whether for the Forfeiture alone, or for that and the Coſts together, put out Serjeant, who was of Counſel for the Defendant, to ſearch the Roll, the Remembrance, and the Court-Book; but in ſearching he could find no Footſteps of any Judgment for *Coſts*, but was fully ſatisfied, by the Report of the Horſe-courſer himſelf, of the Truth of this Matter, *viz.* that he paid only the 10 *l.* and no Coſts.

Percival qui tam verſus *Mitchel*.

Tempeſt. Hill. 6 W. III. C. B.

York, ſs. DEBT qui tam, &c. upon the Statute 23 Eliz. againſt the Defendant for not coming to Church, the Forfeiture is 20 *l.* per Month, to be divided between the Queen, the Poor, and the Informer.

The Defendant pleads a former Conviction in Bar, in which Plea he recites the aforeſaid Act, and further, that by the Statute 29 Eliz. it was enacted, That an Offender once convicted for not coming to Church contrary to the Statute 23 Eliz. ſhall in Eaſter and Michaelmas Terms next following pay into the Exchequer 20 *l.* per Month, and every Year after that Rate, &c. for ſo long as he ſhall forbear to come to Church contrary to the ſaid Act; and in Default thereof, that the Queen may ſeize all his Goods, and two third Parts of his Lands and Leaſes. 29 Eliz. cap. 6. This ſhould be 28 Eliz. cap. 6.

That when an Indictment is found againſt ſuch an Offender, a Proclamation ſhall be made to render himſelf to the Sheriff before the next Aſſizes, and that his Neglect to do ſo ſhall be a ſufficient Conviction.

Then he ſets forth Part of the Statute 3 Jac. by which Juſtices of Aſſize, Gaol-Delivery, and of the Peace, have Power to hear and determine all Offences for not coming to Church, and to make Proclamation that they render themſelves to the Sheriff before the next Aſſizes or Seſſions; and, upon Neglect, to record the Default, which is as a Conviction by Verdict. 3 Jac. cap. 4.

That every Offender in not coming to Church as aforesaid, shall, after Conviction, pay into the Exchequer in Easter and Michaelmas Terms the Sum then due for the 20 l. per Month, and every Year afterwards in the same Terms according to that Rate, except where the King shall take two Thirds of their Lands and Leases, so that they conform and come to Church.

That every Conviction shall be certified into the Exchequer before the End of the next Term following it, that the Court may award Process for Seizure; and that if Default shall be made in Payment as aforesaid, that then the King may seize, &c.

Then he sets forth, That he was indicted at the Sessions for not coming to Church, that Proclamation was made to render himself to the Sheriff before the next Assizes, which was not done; that the Default was recorded, and thereupon he was convicted, which Conviction was certified into the Exchequer, &c.

To this Plea the Plaintiff demurred, and nothing further was done in it.

Noy. 117. *Lane* 60. The Serjeant advises his Reader to look into these Cases following, which prove, that a Conviction by Proclamation is a Bar to an Information; and in the first Case which he cites, the Information was brought before the Party was convicted, which is something extraordinary.

Bridg. 120. 2 *Cro.* 480. idem. *ff.* It was an Information brought upon the same Statute aga the Husband and Wife for the Recusancy of the Wife, and the same Plea was pleaded as in this Case; and upon Demurrer to it, the Informer had Judgment,

3 *Jac. cap.* 4. Because the * Statute was not pursued, for that enacts, That when a Person is indicted and doth not appear, then Proclamation shall be made that he render himself *to the Sheriff before the next Assizes*, &c. and the Defendants had pleaded that Proclamation was made for the Wife to surrender her self (but did not say *to the Sheriff*) *at* the next Assizes; it should be *before* the next Assizes; so that the Woman was not convicted, because the Proclamation was wrong.

But if she had been proclaimed according to the Statute, and the Conviction had been good, it had still been in vain, and the King could have no Judgment in that Case, because his Remedy was to seize the Goods, and two Thirds of the Lands; but a Feme-Covert hath neither Goods or Lands, and her Husband shall not be punished for her Offence, because she was convicted upon an Indictment, to which he was no Party.

The same Case is reported in 2 *Cro.* 480. but all that is mention'd there to this Purpose is only the Opinion of the Ch. J. *Mountague*, That if the Woman had been a Feme-Sole, it might have been a good Bar; but there is no Reason given for it: Now an Opinion without Reason to back it, is but an Opinion still, and as such it makes no Manner of Impression upon the Minds of Men, unless they can form to themselves some suitable Reasons to support it.

Barnaby versus *Nandike*.

Winford. Trin. 9 W. III. Rot. 1875.

York, ss. DEBT qui tam, &c. against the Defendant for 20 l. per Month for not coming to Church for eleven Months, and concludes contra formam Statuti.

The Defendant pleaded in Bar another Action brought against her for the same Offence, and that the Informer had Judgment in that Action.

The Plaintiff replied protestando, That such Judgment was obtained by Fraud; and then pleads, That the Prosecution in that Case was not within a Year after the aforesaid eleven Months.

The Defendant rejoined, That the Prosecution was within the Time limited; and upon Demurrer, there were two Objections to the Declaration.

1. Because it concluded contra formam Statuti, when it should be Statutorum; for the Statute 23 Eliz. depends upon that of 1 Eliz. viz. That Persons who refuse to go to Church against the Form of the Statute 1 Eliz. shall forfeit 20 l. per Month. Cro. Eliz. 2. 750. 2 Cro. 142.

But this Exception was disallowed, because the Precedents in the printed Books of Entries conclude contra formam Actus, and contra formam Statuti. Co. Ent. 569. Winch. 522. 523.

I believe there is not the like Precedent in Justice *Warburton*'s Manuscript; if there had, then our Serjeant might have cited it against that Judge's Opinion, who * held, That where one Statute made an Offence, and another increased the Penalty, if an Information is brought for that Penalty, you must conclude *contra formam Statutorum*. * Owen 135.

2. Another Objection was made, That the Declaration was too general, and not agreeable with the Precedents, which shew to whom the 20 l. per Month is forfeited, viz. Two Thirds to the Queen for her self, and for the Poor, the other Third for the Prosecutor.

But this was also disallowed, because the Precedents are both ways, and the Court will take Notice how the Penalties are to be distributed.

The Serjeant should have mentioned where those Precedents are to be found; he tells us, That he could not find any Judgment given in this Case, and that he was often discouraged in searching the Court-Rolls, because he lost his Labour; if this is true, how often will his Reader be discouraged in searching those Authorities which he hath cited in his Books? Many of which are to be found no where, and others, when found, are nothing to the Purpose for which they are cited.

Belasyse versus *Burbridge* & al'.

Trin. 7 W. III. Rot. 684.

Nottingham, ss. TRESPASS, &c. setting forth, That the Plaintiff made a Lease of a Messuage and Lands in Northmuskam, Holme and Bathley, to one Robinson, for one Year, and so from Year to Year as long as both Parties should agree, rendring Rent, which being in Arrear, he distrained five Quarter of Barley for the Rent of one Year and an half, &c. and that the Defendant apud Holme did rescue the Distress.

Upon Not guilty pleaded the Plaintiff had a Verdict, and it was moved in Arrest of Judgment,

1. The Plaintiff had not set forth, That he gave Notice to the Owner of the Goods distrained.

But it was answered, That Notice was not necessary to be given to the Defendants, because they were the Wrong-doers.

2. The Plaintiff did not alledge, That the Corn was unthrashed; and that the Act gives Power only to distrain Sheaves or Cocks of Corn, loose or in the Straw.

To which it was answered, That whether thrashed or not, Corn is distrainable.

3. That the Rent being reserved for a Year, and so from Year to Year; the Lease was determined at the End of one Year, and therefore the Plaintiff could not distrain for more than a Year.

But this was held a good Lease for two Years; and to prove it,

6 *Rep.* 35. *B.* The Bishop of *Bath*'s Case was cited, where 'tis held, That such a Lease after three Years is but a Lease at Will.

The next Case in the Book is *Cro. Eliz.* 775. which was a Lease *from Year to Year*, as long as both Parties pleased; this was held a good Lease for two Years, and differs from the Bishop of *Bath*'s Case, because that was a Lease for *one Year* certain, and so *from Year to Year*, &c.

Goslwick's is differently reported by *Siderfin*, and in the first *Mod.* for in *Sid.* 423. (and not 427.) 'tis said, That the Lease was for *one Year*; and so from Year to Year, *&c.* And the Action of Debt was brought for Rent arrear in the third Year after the Commencement of this Lease, without averring that the Defendant entered and was possessed, *&c.* in that Year; and it was objected, that for want of alledging the Continuance of his Possession, that Action would not lie for Rent arrear in the third Year, because it was then but an Estate at Will; from which we are to infer, that it was a good Lease for two Years.

1 *Mod.* 4. The 1 *Mod.* tells us, That the Plaintiff had a Verdict for two Years, which differs from *Sid.* for he says, The Action was brought for Rent due on the third Year; but from both we may collect, That the Plaintiff should have alledged the Continuance

of the Poſſeſſion even in the ſecond Year, and that 'tis a Fault to omit it; but 'tis ſuch which is cured by a Verdict; for in ſuch Caſe it ſhall be intended, That the Defendant was in Poſſeſſion all the Time, for which the Rent was found in Arrear.

3. The laſt Objection was, That there was a Miſ-trial, becauſe the Venue is laid at Holme, when it ought to be from all three Places where the Lands lie.

But it was anſwered, That the Action being brought for a Wrong done, and not upon the Demiſe it ſelf, which was only an Inducement to it; the * Venue may be laid in that very Place where the Wrong was done: And ſo the Plaintiff had Judgment.

* Cro. Eliz. 427, 619, 751. *and not* 571. Noy 9. Hob. 305. Hutt. 39.

Ridley & al' verſus *Bell.*

Cooke. Trin. 13 W. III. Rot. 406.

DEBT, &c. upon the Salt Act, viz. By the Statute 5 & 6 W. & M. there is an Allowance of 15s. given to the Exporter for every Hundred of Cod-fiſh exported during the Continuance of the Duty upon Salt, which, by that very Act, was to be from the 25th of March, 1694. to the 17th of May, 1697. 5 & 6 W. & M, cap. 1.

By another Act, Anno 9 & 10 W. 3. there is 35s. more given to the Exporter for every Hundred of Cod-fiſh exported.

The Plaintiff brought an Action for 405 l. being after the Rate of 50 s. per Hundred for 17000 Cod-fiſh, entered to be exported 8 Feb. 1700.

And upon Nil debet pleaded, the Matter was found Specially, and the Queſtion was, Whether this Action was not brought for the Allowance of 50 s. per Hundred, for Cod-fiſh exported after the Duty on Salt was diſcontinued? For by the Act 5 & 6 W. & M. that was to continue but till 17 Maii, 1697. and this was brought for Cod-fiſh exported 8 Feb. 1700.

But there was another Act, viz. 7 & 8 W. which was made between both thoſe former Statutes; and by that Act, the Duty on Salt was made perpetual: Now, though that Act was made two Years after the firſt Act 8 W. yet the Parliament began 22 Novemb. 1695. which was during the Continuance of the Act 5 & 6 W. & M. and 'tis recited therein, and made perpetual; ſo that 'tis the ſame Thing as if it had been made perpetual at firſt.

And this agrees with the Opinion of the Lord Chief Juſtice *Popham* in * *Dingley* and *Moor*'s Caſe. *ff.* That where a Statute is made to continue for a certain Time, and afterwards 'tis made perpetual by another Act, in ſuch Caſe the Offence may be ſuppoſed *contra formam* of the firſt Statute. * *Cro. Eliz.* 750.

Aſſumpſit.

Assumpsit.

Stinton versus *Yates*.

Wyrley. Hill. 36 & 37 Car. II.

Worceſter ſſ. CASE, &c. in a Special Promiſe, viz. That whereas the Defendant's Son had lain with the Plaintiff's Daughter, and got her with Child, of which ſhe was delivered; and that the Plaintiff intending to proſecute the reputed Father, and the Defendant deſiring an Agreement, &c. there was a Colloquium between them concerning the Maintenance of the Child, and thereupon it was agreed, That if the Plaintiff would promiſe to keep the Child for five or ſix Years, and would not proſecute the Son, that then the Defendant would pay the Plaintiff 10 l. and ſo lays mutual Promiſes, &c. and avers, That he had maintained the Child, &c. and had not proſecuted the reputed Father; then he alledges a ſpecial Requeſt, but that the Defendant had not paid the 10 l. &c.

Upon Demurrer to this Declaration it was objected, That the Plaintiff did not aver that he had promiſed to maintain the Child five or ſix Years, which is a Condition that precedes the whole Agreement.

The Serjeant hath given a very myſterious Anſwer to this Objection, which I believe to be his own; though he was Counſel for the Defendant, and which I will explain and make a little more intelligible.

Mſſ. The Plaintiff had laid mutual Promiſes in his Declaration, *viz.* That the Promiſe which he made to perform the Agreement on his Part, was the very Conſideration that the Defendant promiſed to perform it on her Part: And this was held a ſufficient Averment, that *he promiſed* to maintain the Child.

Johnſon

Johnson & Ux. versus *Mapleroft.*

Belvin. Hill. 2 & 3 Jac. II. Rot. 1465.

Northampton ff. CASE by the Husband and Wife, for Money lent by the Wife dum sola, &c. Then they alledge a Special Request by the Wife on the 2d Day of November, &c. before Marriage, and by the Husband 1° Decembris afterwards, and that the Defendant had not paid it.

The Defendant pleads in Bar, That he was always ready to pay the Money, and that he tendered it, &c. on the first Day of May, 2 Jac. And upon Demurrer to this Plea, the Plaintiff had Judgment, because the Tender was alledged to be after both the Requests.

Dimock versus *Wetherall.*

Winford. Trin. 3 Jac. II. C. B. Rot. 1111.

Lincoln ff. CASE by an Infant Administrator, who by his next Friend queritur de C. W. an Attorney, for Money due to the Intestate in his Life-time, &c.

Upon Demurrer to this Declaration the Defendant had Judgment, because all Actions brought in the Court of Common Pleas, are either by Original Writ or Bill, or by Attachment of Privilege; and this Action was not brought by either of those ways; for 'tis thus. ff. The Plaintiff queritur only, &c. when it should be the Defendant *attachiatus fuit* to answer, *&c.*

Coningsby versus *Rodd.*

Belvin. Mich. 3 Jac. II. Rot. 833.

Hertford ff. CASE, &c. upon a Special Agreement, setting forth a Colloquium between the Parties concerning the Tithes yearly arising out of a Meadow; and that the Plaintiff affirmed he was Proprietor of the said Tithes, which the Defen-

dant denied, and thereupon it was agreed, That the Defendant ſhould ſtill continue to take up the Tithes for his own uſe, and that if the Plaintiff ſhould recover the Tithes upon a Trial at Law, then the Defendant was to pay 20 s. for every Year he had collected them: There were mutual Promiſes laid in this Declaration to perform the Agreement; then the Plaintiff avers, That he did recover in a Trial at Law, &c. and that in Conſideration he did permit the Defendant to take up the ſaid Tithes, he promiſed to pay 20 s. per Annum, and avers, That he did permit him ſo to do: Then he lays another Promiſe, upon which the Queſtion did ariſe, viz. That in Conſideration he had promiſed to ſuffer the Defendant to take and receive the Tithes, he promiſed to pay 20 s. per Annum, &c.

The Serjeant tells us, That an Exception was taken to this Declaration, but doth not ſhew whether it was upon a Demurrer, or in Arreſt of Judgment; and the Exception it ſelf is ſo intricately expreſſed, that 'tis very difficult to be underſtood; it was thus:

ff. As to this laſt Promiſe, it was to pay a collateral Sum where there was nothing due before; for the 20 s. was not a Debt, nor ſo much as a Duty before the Promiſe made; therefore it muſt begin with the Promiſe it ſelf; and if ſo, the Plaintiff ought to alledge a *Special Requeſt* to pay the Money, or his Declaration will be naught.

This muſt be admitted to be true where the *Requeſt is made part of the Agreement*, *viz.* where the Promiſe is to pay *upon Requeſt*, which is not this Caſe, therefore there needs no Special Allegation of a Requeſt.

And as to this Matter there is a Diſtinction in the Books, *viz.* That where an Action is brought for a certain Debt, *viz.* for 10 *l.* upon the Sale of a Horſe; there the general Allegation *licet ſæpius requiſitus, &c.* is a ſufficient Requeſt, becauſe in ſuch Caſe the very bringing the Action is a good Demand in Law: But where a Promiſe is to do any Thing *upon Requeſt*, there 'tis Parcel of the Agreement, and a *Special Demand* muſt be alledged to entitle the Plaintiff to an Action.

Ewers verſus *Benchkin.*

Cooke. Mich. 4 Jac. II.

London ff. CASE upon a Bill of Exchange, ſetting forth a Cuſtom in London, amongſt Merchants and others dwelling there, That if any Merchant ſhould draw a Bill of Exchange directed to another, requiring him to pay, &c. and if the Perſon on whom it was drawn, did accept the Bill, then he became liable to pay the Money ſecundum acceptationem ſuam.

That one King drew a Bill at Sandwich upon the Defendant, to pay 8 l. to the Plaintiff. That the Defendant accepted the Bill, but had not paid the Money.

And upon Demurrer to this Declaration the Defendant had Judgment, because there being no Time mentioned in the Bill it self when the Money was to be paid, and the Plaintiff having not set forth that the Defendant accepted it to pay at Sight, or at a Time certain, it doth not appear that the Time of Payment was past before the Action brought.

Stanhope versus *Butler.*

Hill. 2 W. III.

York ss. CASE upon a Special Agreement against an Attorney, wherein the Plaintiff sets forth, That it was agreed between him and the Defendant, that the Plaintiff should make a legal Conveyance to him of a House, &c. and that the Defendant should pay 135 l. Then he lays mutual Promises, Cumq; etiam in Consideration that he had executed a Lease and Release, & vendidisset eidem Josepho (which was the Defendant) his Interest in the said House, super se assumpsit to pay the Money; then he lays an Indebitatus assumpsit for the 135 l.

The Defendant pleaded Non assumpsit, and it was found against him, and entire Damages given; and it was moved in Arrest of Judgment, That the Declaration was naught, because the Plaintiff had not alledged, That the Defendant *super se assumpsit.*

In Proof of this Matter these Cases were cited. *ff.* Debt on a Charter-Party, brought by the Master of a Vessel against the Merchant; wherein amongst other Things the Plaintiff sets forth, That for the Performance of the Agreement on the Part of the Merchant, *Obligasset se* to the said Master. 2 *Vent.* 196.

'Tis true, the Court gave Judgment upon a Demurrer against the Plaintiff, because he did not set forth *quod ipse prad' mercator obligasset se*; but this was against the Opinion of Justice *Ventris*: For I think in the plain *Grammatical* Construction of these Words, it must appear that the Merchant was bound; for 'tis said, That for the Performance of the Agreement on the Part of the Merchant *obligasset se*; now it cannot be intended that any other was bound but he who was last named, and in such Case 'tis more elegant *Latin* to say, That *obligasset se*, than to set forth *quod ipse obligasset se.*

The next Case was in the same Book, and it was in Replevin; the Defendant made Cognizance as Bailiff of *Elizabeth Cossen*, and sets forth a Conveyance made unto her by *Nicholas Cossen*, which upon *Oyer* was thus: 2 *Vent.* 141, 142.

ff. This

ff. This Indenture, *&c.* made between *Nicholas Coffen*, of the one Part, and *Elizabeth Coffen* of the other Part, Witneſſeth, That whereas the ſaid *Elizabeth Coffen* hath ſurrendered into the Hands of the ſaid *Nicholas*, one Indenture of Annuity, *&c.* for a Term yet to come, as by the ſame it appeareth, Hath given and granted, and by theſe Preſents doth give and grant.

It was objected, That this was not a good Grant, becauſe the Name of the Grantor was omitted in the granting Part of the Deed; but it was held, That the Indenture being between *Nicholas* of the one Part, and *Elizabeth* of the other Part, it muſt be intended that *Nicholas* granted.

Therefore in the principal Caſe the Court likewiſe held, That the Words Cumq; etiam ſignified **moreover, which coupled the ſecond Promiſe to the firſt, where the Defendant was rightly named.**

Beſides, the Chief Juſtice Treby was of Opinion, That this being after Verdict was helped by the * Statute of Jeofailes, which enacts, That after a Verdict Judgment ſhall not be ſtayed for Want of Form, *&c.* or for miſtaking the Chriſtian or Surname, being once rightly named in the Record: Now this Caſe cannot be comprehended under this laſt Clauſe, for the Name is not *miſtaken*, but wholly *omitted*; if ſo, it muſt fall under the firſt Words, *viz. Want of Form.*

Remington Vid. verſus *Tayler.*

Trin. 13 W. III. Rot. 406.

York ff. **CASE wherein the Plaintiff declared, That ſhe was poſſeſſed of ſeveral Goods, which ſhe ſold to the Defendant for 63 l. 12 s. 6 d. and that Half a Crown thereof was to bind the Bargain, and the reſt was to be paid on Demand; then ſhe laid mutual Promiſes, That in Conſideration ſhe had promiſed to deliver the Goods, &c. he promiſed to pay the Money;** Cumq; **etiam the Plaintiff had ſold divers Goods to the Defendant, ſuper ſe aſſumpſit to pay the Money, but did not ſet forth any Place where this Promiſe was made: And after Judgment by Default, and a Writ of Enquiry executed, this was moved in Arreſt of Judgment; but the Exception was not allowed, becauſe the Judgment was by Default, and in ſuch Caſe the Want of a Venue was not material; for any Juroys of the County may make Enquiry of Damages.**

Cro. Eliz. 880.

Morris versus *Coles.*

INDEBITATUS assumpsit for several Sums upon several Promises.

The Defendant after an Imparlance alledges, That the several Sums for which the Plaintiff had declared, amounted to 66 l. And as to 64 l. Part thereof, he pleads Non assumpsit; and as to the rest he pleads in Bar, That those several Promises alledged by the Plaintiff, were but one and the same Contract for an House, and that before the Action brought he tendered the Residue, viz. 1 l. 12 s. to the Plaintiff, which he refused to accept, and that paratus fuit and is still ready to pay the same.

Upon Demurrer to this Plea it was held ill after an Imparlance; besides, it was uncertain for which of the Promises the Money was tendered. Raym. 449.

A Plea in Abatement is ill after a general Imparlance, and much more a Plea in Bar as this was. *Antea* 11.

Swinburne versus *Ogle.*

Winford. Trin. 11 W. III. Rot. 394.

Northumberland ss. QUANTUM meruit and indebitatus assumpsit for Goods sold and delivered.

The Defendant pleaded Infancy in Bar.

The Plaintiff replied, That Parcel of the Goods for which he had declared, were for the necessary Cloaths of the Infant, and the Residue was for his Meat and Drink, &c.

The Defendant rejoined, That Parcel, &c. was not for Cloaths, and Parcel, &c. was not for Meat and Drink, and tendered an Issue.

But the Plaintiff demurred to the Rejoinder, and objected, That the Defendant had said, That Parcel, &c. were not for Necessaries, yet he did not say, nor any Part thereof; so that this seems to be a Negative pregnant; for Parcel of the Goods may not be for Necessaries, and yet some may.

The Exception was not allowed, because it was on the Plaintiff's part to shew what were Necessaries.

The Cases cited by the Serjeant as to this Exception are, 1 *Saund.* 312. and 1 *Mod.* 146; but I lost my Labour in looking into those

Cases, as he had done by searching after Rolls, for there is not one Word there relating to this Matter.

2. **The next Objection was, That the Defendant ought to put his Allegations severally in Issue, and not to say, That Parcel was not for Cloaths, and Parcel not for Meat and Drink, and then tender an Issue upon the whole.**

The Serjeant hath cited *Dyer* 326. and according to his usual way of Citation, there is nothing in that Page to this purpose.

But I find this Objection was likewise disallowed, and the Cases cited relating to it were,

Ss. Noy 132. It was Debt on two Bonds, the Defendant pleads *non sunt facta*, and did not put the Matter severally in Issue, and it was held a good Plea.

2 *Cro.* 544. *Cro. Car.* 219. *Sid.* 332. *are to the same purpose.*

The Case in 2 *Cro.* is to the same Purpose, *viz.* it was an Action brought on several Promises; the Defendant pleaded *non assumpsit* as to all, and did not put them severally in issue, and yet the Plea was held good, for it extends to all.

1. **But then it was objected against the Replication, because the Plaintiff had not distinguished which Goods were for Apparel, and which for Food; and so it was uncertain, and this was held a good Exception.**

Poph. 208. As in Trover for two Loads of Corn, the Defendant justified by the Command of *H.* to whom part of the Land did belong on which the Corn did grow, and by the Command of *P.* to whom the other Part did belong; and because he did not shew particularly how much did grow on each Person's Land, the Plea was held ill.

Sid. 338. So where Debt for Rent was brought against an Assignee of a Term, who pleaded *quoad* 20 *l.* Part of the Rent, *nil debet*, and as to the Residue, That he had assigned the Term, *&c.* This Plea was held ill, because he ought particularly to have shewed when the 20 *l.* was due, *viz.* in what Year.

Gery versus *Cooke.*

Winford. Trin. 4 W. & M.

London ss. CASE against an Executor for 50 l. received by the Testatrix.

The Defendant pleaded the Statute of Limitations in Bar to the Action.

The Plaintiff replied, That she was under Age at the Time of the Promise made; and that within six Years after she came of Age, she filed an Original against the Defendant.

The Defendant rejoined, That the Statute of Limitations doth not give Liberty to one who was an Infant, to bring an Action on the Case within six Years after he is of Age, &c.

And upon Demurrer to this Rejoinder, the Plaintiff had Judgment.

The Serjeant refers us to the Case of * *Chandler* and *Vilet*, for the Reason of this Judgment, which was thus: * 2 *Saund.* 120.

ff. It was an *Action on the Case*, brought by an *Infant*, by his Guardian, *&c.*

The Defendant pleaded the Statute of Limitations; the Plaintiff replied, That he was under Age at the Time of the Promise made, *&c.*

And upon Demurrer it was objected, That by this Statute the Privilege of Infancy did not extend to *Actions on the Case*; for tho' the bringing such Actions is restrained to six Years in the Body of the Act, yet they are not excepted in the Proviso or saving Clause; for by that Clause the Privilege of Infancy is extended to Actions of *Trespass*, *Detinue*, *Trover*, *Replevin*, *Accompt*, *Debt*, *Trespass for Assault*, *Menace*, *Battery*, *Wounding*, *Imprisonment*, *Words*; and Actions on the Case are omitted.

But the Court held, That those Actions are within the *Equity* of that Proviso, altho' not *expressed*; for the Intent of it was to preserve the Rights of Infants; and no Man can think that it should preserve their Right to a little Action for Slander, and not for a Duty really owing to them.

Thorpe versus *Thorpe*.

Hill. 8 W. III. Rot. 1667.

York, ff. CASE on a special Agreement, wherein the Plaintiff sets forth, That he had mortgaged two Closes to the Defendant, and that there was a Colloquium between them concerning the said Mortgage, and a Release of the Equity of Redemption, and concerning some Money due to the Defendant; upon which Discourse, the Plaintiff agreed to release the Equity of Redemption to the Defendant; in Consideration whereof the Defendant agreed to pay 7 l. to the Plaintiff: There were mutual Promises laid in the Declaration; then the Plaintiff averred Performance on his Part, and that the Defendant had paid 25 s. in Part of the 7 l. and so lays an Indebitatus assumpsit for the Residue, it being in Consideration of the Release of the Equity of Redemption, and that the Defendant had not paid it.

The Defendant pleads in Bar, That after the first Promise, which was made 29 July 1694, the Plaintiff by Deed released all Actions, &c. That the second Promise was made before that Day, which was likewise released.

The

The Plaintiff replied, and craved Oyer of the Release, &c. which was of the Equity of Redemption, but without expressing the Consideration; and at the End of the Deed there were these general Words, viz. All Actions, Suits, Debts, Duties, Sums of Money, and Demands whatsoever.

And upon Demurrer to this Replication it was objected, That this Action was released; but it was held that it was not, because the Release preceded, and was the very Reason of the Action; for till that was executed, the Plaintiff had not Cause of Action for the 7 l. and therefore it was absurd to imagine that the Release should discharge that very Duty which it created.

Palm. 218. 2 Cro. 623. *and not* 627.

To prove this, the Case of Potter and Philips was cited. *ff.* It was an Action on the Case, wherein the Plaintiff declared, That in Consideration he would lend 7 *l.* 10 *s.* to the Defendant, *&c.* and would promise to release unto him all Actions, *&c.* that in such Case the Defendant promised to pay a Sum of Money to the Plaintiff in a certain Time: The Plaintiff alledged, That he had lent the Money, and executed a *Release*; and the Question was, Whether that Release did not extinguish this Action? And held it did not; because it was Part of the Consideration upon which the Action it self did arise.

5 Rep. *Hoe's* Case. 2 Rol. Abr. 407. Hob. 216. 2 Cro. 571. *and not* 57.

There were many Cases cited to prove that those general Words, at the End of this Release, could not discharge this Action for the 5 l. 15 s. because it was not a Duty before the Release was executed.

There was a Writ of Error in B. R. brought on this Judgment; and after divers Arguments, it was affirmed upon the Reasons and Authorities following.

First, It cannot be denied, that if the Plaintiff might bring an Action for this Money before the Release was executed, then this Release would be a good Bar; and it was insisted on for the Defendant, that the Plaintiff was intitled to this Action upon the mutual Promises laid in the Declaration, which may be true in some Cases, but not in this; because 'tis Part of the Agreement that the Plaintiff should release; and it was upon that Consideration that the Defendant was to pay the Money.

'Tis true, If A. promiseth to deliver a Cow to B. and he promiseth in Consideration thereof to pay 5 *s.* to A. he may bring an Action for the Money, without averring the Delivery of the Cow; because these are mutual Promises, and a Promise against a Promise is a good Consideration to raise an Action; and this was the Case of * Nichols and Rainbred, in my Lord Hobart.

* Hob. 88. 15 H. 7. 10. B.

So where one covenants to serve another for a Year, and the Master covenants to give him 20 l. (but doth not say for such Service) there the Servant may bring an Action of Covenant against the Master for the 20 l. and need not avet that he served him, because the Covenants are mutual; upon which each of them may have mutual Remedies.

But where mutual Promises are laid in a Declaration, which relate to an *Agreement* between the Parties, *viz.* in Consideration the Plaintiff did promise to perform *the Agreement* on his Part, the Defendant likewise promised Performance on his Part, (as in the principal Case) there the Action is grounded on the *Agreement*, and not on the Promise.

And in some Cases the Plaintiff may bring an Action upon an Agreement, before he hath performed what he is to do by that very Agreement.

As if B. agreeth to pay Money to D. on a certain Day, for such Work to be done by him; in such Case D. may have an Action for the Money after the Day is past, and before the Work done.

So where one covenants to serve another in the Wars against France, and that other covenants to pay him 42 Marks; the Action lies for the Money before the Service performed. 48 Ed. 3. 2. 3. 7 Co. 10.

The Reason in both these Cases is, because each Party hath an equal Remedy; one for the Money, and the other for the Work or Service.

So where an Agreement was, that Cole should pay Postage 500 *l.* for all his Lands, on a certain Day; there, after the Day is past, an Action lies for the Money before the Land is conveyed; upon the same Reason as in the Cases last mentioned. 1 Sand. 319. 1 Vent. 147.

There is another Nicety in these Matters, which is thus: *ff.* That if by Agreement there is a certain Day appointed to do a Thing, &c. and that Day happens to be past before the Thing is actually done; in such Case, if an Action is brought, the plaintiff must aver, that the Thing was performed.

This seems to me very intricate, and in no Sort proved by the Cases cited.

The first is in *Dyer* 76 *a.* where it is said in the latter End of that Case, That if one agrees to deliver a Hawk to another at a certain Day, and the other, in Consideration thereof, agrees to deliver unto him a Horse at *Christmas* following; if the Hawk is not delivered on the Day, the other shall never have an Action for the Horse.

The other is in *Jones* 218, which was thus: *ff.* The Testator and one *Crooke* and another had several Interests in Lands in *D.* and in Consideration that the said Testator had promised to grant his interest in the said Lands to the Defendant, he promised to pay 500 *l.* on *Michaelmas* following, *if the Defendant could agree with* Crooke *for the Lands.*

The Testator died; the Plaintiff brought an Action for the Money, and set forth, That after the Death of the Testator, the Defendant agreed with *Crooke* for his Lands, and that the Testator in his Life-time, and the Plaintiff after his Death, were ready to convey the other Land, *&c.*

After a Verdict for the Plaintiff, it was moved in Arrest of Judgment, that the *Bargain* was, That the Defendant should have a Conveyance of Part of the Land, for which he was to pay 500 *l. if he could agree with* Crooke for the other Part; so that if he should dis-

agree, then he was not to pay the Money; and if that was not paid, then the Plaintiff was not to convey.

Now this Agreement to be made with *Crooke* goes to the whole Bargain between the Testator and the Defendant, and made it conditional; and the Testator dying before the Defendant had agreed with *Crooke*, the Bargain between them was dissolved of Course, because he could not make a Conveyance after he was dead.

Now both those Cases prove, That where there is an Agreement to do a Thing on a certain Day, and in Consideration thereof, the Defendant agrees to pay Money, or do some other Act; there, if the Day is past before the Thing is done, the Agreement is dissolved; if so, the Action is brought in vain; for, Whether the Plaintiff avers the Performance of the Act on his Part, or not, if these Cases are Law, it will not lie.

7 Rep. 16. B. **Some of my Lord Coke's Expressions in Lightre's Case, have occasioned different Opinions in our Books, which were now to be answered.**

But first I think we should be told what my Lord *Coke* said, which I take to be thus: *If A.* is to have Money in Consideration of something to be done by him; there he must shew the Performance on his Part, because it amounts to a Condition precedent; but if upon any Agreement, each Party have an equal Remedy; one for the Money, and the other for the Thing to be done; there the Plaintiff need not shew the Performance on his Side.

It seems the Variety of Opinions concerning this Matter are in two or three Cases in my Lord *Rolle's* Abridgement.

Rol. Abr. 415. 1 *Bulst.* 167. The first is thus: *If. Gurnel* and others covenant with *Clerk* to let a Ship to freight to *B.* after this Manner, *viz.* That the Ship should sail to *Lyme*, and take Freight there, then to proceed to *Yarmouth*, and so further, *&c.* and *Clerk* covenants to pay to *G. pro tota transfretatione* 147 *l.*

My Lord *Rolle* tells us, That *Gurnel* might have an Action of Covenant without averring any Performance on his Part, because these are distinct Covenants; but *Bulstrode*, who reports the same Case, tells us otherwise: 'Tis true, the Plaintiff had Judgment in the Common Pleas; but a Writ of Error was brought in *B. R.* and that Judgment was reversed, because these are not distinct Covenants upon which mutual Remedies might be taken; for the Word *pro* makes it conditional, and refers to some Matter precedent, to be done before the Money is payable, which is preparing the Ship, taking in freight, *&c.* and this must be performed, and so alledged in the Declaration, before the Plaintiff can be intitled to the Action.

There seems to be a Difference between such a Covenant as in *Gurnel's* Case, attended with so many other Circumstances, and an express Covenant in behalf of a third Person, that he shall do such an Act; as for Instance, *A.* covenanted in behalf of *B.* that he (for the Consideration afterwards mentioned in the Deed) should convey Land to *C.* and *C.* covenanted, *pro consideratione prædicta*, to pay 160 *l.* to *B.*

1 *Rol. Abr.* 415.

It

It was held in that Caſe, that tho' *B.* did not convey the Land, yet *C.* muſt pay the Money, becauſe theſe were mutual Covenants; for *A.* expreſly covenanted that *B.* ſhould convey, *&c.* for the Conſideration after mentioned; and *C.* covenanting to pay the Money for the Conſideration aforeſaid, tho' he did not ſay for the conveying the Land, it muſt be intended to be in Conſideration of that Covenant made by *A.* that *B.* ſhould convey; and ſo each Party had a mutual Remedy; and this was *Eaton* and *Dixon*'s Caſe in my Lord *Rolle*'s Abridgement, 415.

In the ſame Folio there is a Caſe between Vivian and Shipping, which was thus: If An Award that A. ſhould pay B. 10 l. and in Conſideration thereof, B. ſhould give Bond to A. to releaſe all his Right to certain Lands, &c. In this Caſe my Lord Rolle tells us, That two Judges held, B. was bound to execute this Bond, tho' A. hath not paid the 10 l. for the Reaſon mentioned in the laſt Caſe, viz. becauſe each Party hath a mutual Remedy, if the Award is not performed; but Juſtice Croke was of a contrary Opinion: and my Lord Rolle, at the End of that very Caſe, tells us, that it was adjudged alſo to the contrary in Michaelmas Term, 10 Car. but between other Parties.

If ſo, he was plainly miſtaken in the Opinion of thoſe two Judges, who were *Jones* and *Berkeley*; and he was miſtaken alſo in **Croke*; for the very ſame Caſe is reported by him; and he tells us, that thoſe two Judges held it to be a precedent Condition, *viz.* That the 10 *l.* was to be paid before the Bond ſhould be given, and that *Croke* himſelf held otherwiſe, *viz.* That each Party had a mutual Remedy. **Cro. Car.* 384.

I only mention this, to ſhew how great Men may be miſtaken; for *Croke*, who was then a Judge, and *Rolle*, who was of Counſel in this Caſe, have reported it quite contrary.

But now from citing Caſes, the Book comes to the Reaſon of the Thing, which is begun in a very odd Manner; for inſtead of a Reaſon, it tells us, there is no Reaſon at all that a Man ſhould pay for a Thing before he has it; the next Paragraph, I muſt confeſs, is highly reaſonable, viz. That he who pays for a Horſe, ought to ride; and that two Men may agree for a Horſe; one to pay, and the other to deliver it; and that upon ſuch mutual Promiſes, each Party may have mutual Actions; but the Book agrees likewiſe, that theſe Men may make an Agreement where it ſhall not be ſo; which is very eaſily done, to agree that which no Man will controvert: And laſtly, to conclude this Paragraph with no Reaſon, as it was begun; it tells us, That 'tis no Reaſon a Man ſhould truſt another againſt his Will, becauſe this would be hazardous in Contracts and Bargains.

I have mentioned this, only to ſhew what a notable Diſcovery there is made in ſuch difficult and uncommon Things.

Saffin

Saffin & Ux. verſus *Shaftoe.*

Trin. 12 W. III. Rot. 1410. C. B.

CASE by Huſband and Wife, as Executrix of Sir John Heron. The Defendant pleads the Statute of Limitations. The Plaintiff replied, That the Teſtator, in his Life-time, filed an Original in Treſpaſs againſt the Defendant, with an Intention to declare againſt him upon his Appearance; That this Writ was deliver'd to the Sheriff of Northumberland, who returned non eſt inventus; and thereupon a Capias iſſued againſt him, and that pendente placito the Teſtator died, ſo that the Plea was diſcontinued; and after the Plaintiffs had proved the Will, they declared againſt the Defendant, &c. and aver, that the Cauſe of Action did accrew within ſix Years after the Original, fil'd by the Teſtator.

The Defendant rejoins, That the Teſtator died long before the Original filed, and traverſed that he was then alive.

The Plaintiff ſur-rejoins, and ſhews, That the Defendant was eſtopped to plead that the Teſtator was dead, &c. becauſe it was againſt a Record, &c. and upon this there was a Demurrer and Joinder in Demurer. But I do not find that there was any further Proceeding in this Caſe; but the next is ſomething like it.

Kinſey verſus *Hayward.*

Cooke. Trin. 9 W III. Rot. 302.

London, ſſ. CASE, &c. by an Adminiſtratrix againſt an Executor, ſetting forth, That the Teſtator was indebted to the Inteſtate in 50 l. for Money lent, &c.

The Defendant pleads in Bar the Statute of Limitations. The Plaintiff replied, That the Inteſtate filed an Original in Treſpaſs quare Clauſum fregit againſt the Teſtator, within ſix Years after the Cauſe of Action did accrew; and that he did not appear, but ſoon after died; whereupon the Inteſtate recenter, viz. on ſuch a Day, filed another Original in Treſpaſs quare Clauſum fregit againſt the Executor, the now Defendant; and he not appearing, the Inteſtate died; and thereupon the Plaintiff recenter filed another Original in placito Tranſgreſſionis ſuper Caſum againſt the ſaid Defendant; who appeared by his Attorney, and he declared againſt him; and the Plaintiff further ſets forth, That her Husband, the Inteſtate, proſecuted the ſaid firſt Original againſt the Teſtator, with an Intention to declare againſt him upon his Appearance; and that the Cauſe of Action did accrew

accrew within the Years next after the Filing the said first Original: And she further sets forth, That her Husband, after the Death of the said Testator, did prosecute another Original against the Defendant for the Purpose last mentioned; and then she avers that they are the same Persons.

Upon a Demurrer to this Replication, it was objected, That a Writ brought by Journies Accompts, (that is, Where it is abated without the Default of the Plaintiff, as it was in this Case by Death, and a new one brought;) must be by or against one of the Parties to the first Original; but here was neither the same Plaintiff, or Defendant, Writ, County, or Action to the first Original.

Resolved, no such Writ can be brought but where the Original is returned upon Record; which was not done in this Case.

This is Part of the first Resolution in *Spencer's* Case, where my Lord *Coke* tells us, who may have a new Writ by *Journies Accompts*, and who not viz. Where the first Writ abateth merely by Default of the Clerk, either for false Latin, Variance, or Want of Form, or of a good Summons, which is the Default of the Sheriff; in all those Cases the Plaintiff may have a new Writ. *5 Rep. 26.*

But when the first Writ abateth by the Fault of the Demandant himself, as by mistaking the Name of the Tenant or the Vill; or where it abateth for Non-tenure of the whole, as it ought, because the first Writ was brought without any Manner of Cause; in such Cases the Plaintiff shall not have a new Writ by *Journies Accompts*. Tolca 87. Brereton ver- sus Mayle.

Then he tells us, That this Writ must be brought in the same Court where the first Writ was, and of the same Quantity in that Writ contained; that it must be between those who are Parties to the first Writ; as where one of the Plaintiffs or Defendants dieth; but in no Case where there is but one Plaintiff.

And lastly, That no Writ by *Journies Accompts* will lie, but where the first Writ is served and returned on Record; and to prove this, he cited the Year-Book, 14 *H.* 6. 7. where there is nothing to this Purpose, but the Opinion of Serjeant *Elderker*, *arguendo*: *ff.* If a *Præcipe quod reddat* is brought against *two*, and the Writ is returnable on a Day certain, and it happens that one of the Tenants dies before the Return-Day, the Plaintiff shall not aver that the Tenant is dead, and have a new Writ by *Journies Accompts*, because that Writ will not lie, unless the first Writ is *returned served*. And his Opinion further was, That in that Case the Sheriff might be sued for not returning his Writ; which is pretty strange, that an Action should lie against a Sheriff for not returning a Writ, which is actually abated before 'tis returnable.

Now, where the Original is returned upon Record, it is done in the Replication, after this Manner, *viz.* The Plaintiff must set forth, That he delivered the Original to the Sheriff of the County, *&c.* therefore the Return to execute it; and that the Defendant not appearing, the Sheriff returned, that the Plaintiff had found Pledges to prosecute the Writ, *viz.* *John Doe* and *Richard Roe*; and that the Defendant *nihil*

Postea 87. *Brereton* versus *Moyse.*

But one of the Judges was of another Opinion, viz. That it not appearing the Original was returned or made a Record in Court, and there being no Appearances or Continuances alledg'd, the Plaintiff ought not to have Judgment; and upon a Writ of Error brought, that Judgment was reversed, which was affirmed in Parliament.

In this Case, 1 *Rol. Abr.* 357. was cited, but I find nothing there to this Purpose; and 2 *Saund.* 152. but that must be a Mistake; it should be

Gargrave verſus *Every.*

Tampeſt Hill. 5 & 6 Will. & M. Lond. Rot.

Case by an Executrix for Money lent by the Testator, &c.

The Defendant pleaded the Statute of Limitations. The Plaintiff replied, That the Testator sued a special Original in Trespass upon the Case, against the Defendant, setting forth the whole Declaration; and that pendente placito her Husband died.

And upon Demurrer the Question was, Whether this Action, brought by the Executor by Original, be within the Equity of the 4th Paragraph of the Statute of Limitations? Which is this:

viz. That if Judgment is given for the Plaintiff, and is afterwards reversed for Error; or if he hath a Verdict, and the Judgment is arrested; or if any of the Actions, &c. are brought by Original, and the Defendant outlawed, and shall afterwards reverse his Outlawry, that in all such Cases, the Plaintiff shall have a new Action within one Year after such Judgment or Outlawry; but not afterwards.

Now

Now in this Case the Action was brought by Original by the Testator, but he died before the Defendant could be purlained, and it was held, That his Executrix could not maintain this Action within the Year; but it was a hard Case, and the Statute had not provided for it.

Tippet versus *Naylor*.

Winford. Hill. 13 W. III. Rot. 1106.

INDEBITATUS assumpsit & quantum meruit for Goods sold and delivered 1 Maii, 12 W. 3.

The Defendant pleaded a Letter of Licence in Bar, with he had given the Plaintiff and the ten of his Creditors for two Years, from the 29th Day of January, 1699. by which he had leave, within that Time, quietly to go about his Affairs without any Arrest from the Plaintiff, &c. for or by reason of any Debt due and owing by him, and that if the Defendant should be arrested within that Time by the Plaintiff, or by his Contrivement or Procurement, for any Debt then owing; That in such Case the Deed should be an absolute Release and Acquittance of that Debt for ever.

Upon this he sets forth, That within the said two Years the Plaintiff sued out a Capias against him, by Virtue of which he was arrested for a Debt due at the very Time when the Letter of Licence was dated, and that he was hindered in his Business; then he avers his Plea, & petit judicium si præd' (the Plaintiff) actionem suam præd' inde versus eum habere debeat, &c.

The Plaintiff replied and craved Over of the Deed, which was set forth in hæc verba, and thereupon he demurred.

The Serjeant tells us, Two Exceptions were taken to this Declaration, but I suppose he means the Plea.

1. That the Letter of Licence bearing Date 29 January, 1699. which was before the Promises laid in the Declaration, a Traverse ought to be tendered, that is, The Defendant should have traversed that he made any such Promise after the 29th of *January*.

2. That the Plea was not well concluded, for the Licence is a Release, and operates as such, by reason of the Arrest within the Time; and if so, it ought to be pleaded as a Release, viz. *unde petit judicium si præd'* (the Plaintiff) *actionem suam præd' contra præd' scriptum relaxationis præd'* (the Plaintiff) *inde versus eum habere debeat*, and for this Reason a Plea in the like Case was held ill, but the Plaintiff dying, those Points were not adjudged.

The Serjeant hath cited *Brooke*, Title *Defeazance*, 16. as an Authority that this ought to be so pleaded, which Case I have transcribed, that the Reader may see how little 'tis to this purpose. *ff.* It was Debt on a Bond conditioned for the Payment of 20 l. The Defendant pleaded a Deed, by which the Plaintiff had granted that he

* Grotius de jure belli, &c. lib. 2. cap. 12. Parag. 21.

should be discharged of the said Debt; *and if he should be sued, &c.* that the Bond should be void, and that the Deed should enure as an Acquittance. The Book tells us, it was held, That the Debt was discharged by the first Words; and that the subsequent Clause (*if he shall be sued*) was void.

Yeoman versus *Barstow.*

Winford. Trin. 13 W. III.

York ss. CASE upon a Special Promise, wherein the Plaintiff set forth, That he was possessed of several pieces of hammered Money of English Coin, being in Number and Tale 200 l. and that the Defendant in Consideration the Plaintiff would pay that Money to him, promised to repay 300 l. of New Money, together with 4 l. 10 s. more for the Interest of every Hundred Pound for eight Months; then he declares upon an Indebitatus assumpsit for 313 l. 10 s. &c.

Upon non assumpsit pleaded the Plaintiff had a Verdict, and after great Consideration he had his Judgment.

The Question was, Whether this Contract was usurious upon the Face of the Declaration, viz. if being to pay 4 l. 10 s. for the Interest of 100 l. for eight Months; for if so, then the Plaintiff ought not to recover upon his own Shewing.

But the Jury having found that the Defendant assumpsit, the Court would not intend the Contract was usurious.

Now the Ground of this Action was, in Consideration the Plaintiff would pay 200 l. to the Defendant, &c. but certainly paying is not lending, and where Money is not lent there can be no Usury.

It must be admitted, That the Word *Pay* is not very proper to express *Lending*; but 'tis impossible it should be taken in any other Sense in this Place, for 'tis said *paid to be repaid with Interest*; now Paying here can never signifie Paying as a Debt, for 'tis incongruous to say, That a Debt was paid to be *repaid*; therefore it must import *Lending* and nothing else.

Some Instances may be given, where an Allowance above the common and lawful Interest shall not make the Contract usurious; as if a Man hath occasion for Guineas, of which he may make some Advantage, upon an emergent Occasion 'tis not Usury to give more than the true Value of them.

One of the Judges said, That there was a great Difference between *interesse lucri* and *interesse damni*, but how it was applied to this Case the Serjeant doth not mention.

* *Grotius de jure belli, &c. lib. 2. cap. 12. Parag. 21.*

I suppose by * *interesse lucri* a Contract is meant for more than the principal Sum, merely out of a Desire to gain; which was not this Case, so that it must be like *interesse damni*, which is thus, *viz.* where Money is lent until such a Time; now if the Borrower fail

4 of

of Payment at that very Time, and the Lender hath any Damage by that Neglect, he ought to be satisfied by the Borrower; and this is called Interest *ex damno habito*, which comes near this Case.

It was said obiter, That an Action of Debt doth not lie for Interest Money, though the Borrower promiseth Payment with Interest; but it is to be recovered in Damages in an Action on the Case.

So where a Man binds himself by Deed to pay the Principal and Interest, if an Action of Debt is brought against him, the Interest shall not be included in such Action with the Principal; but it must be turned into Damages, which the Jury are to measure to as much as the Interest amounts; and the Reason given by my Lord *Hale* is, because Interest is forbidden by the Law of God; so that 'tis but changing the Name, and calling it *Damages* instead of *Interest*, whilst the Thing still remains: This seems to be a very odd Notion, and not agreeable to the usual Reasoning of that great Man. 1 *Vent.* 198.

The Serjeant cites 2 *Roll's Abr.* 82. but I cannot tell for what purpose; the Book must be mistaken. † The book intended is 2. Ro. Abr. 802.

Lawson versus *Lamb.*

Winford. Hill. 12 W. III. Rot. 1560. C. B.

London ff. CASE by an Assignee of the Commissioners of Bankrupts, setting forth the Custom of Merchants; and that the Bankrupt and the Defendant being Traders, the said Defendant gave a Bill to the Bankrupt for the payment of 280 l. Then the Plaintiff declared upon an Indebitatus assumpsit, and an insimul computasset for so much Money, &c.

The Defendant pleaded, That he accompted with the Plaintiff for all Money due to him, and that upon the Ballance there was 60 l. 10 s. 5 d. due to the Plaintiff, and no more; which he received in full Satisfaction of all Sums of Money for which the Plaintiff had declared.

The Plaintiff replied, That they had not accompted, &c.

There was an Exception taken to this Declaration, viz. That all the Proceedings of the Commissioners of Bankrupts were omitted, which ought to be set forth: But this Exception was not allowed, because several Precedents are as this Declaration is.

But the Serjeant hath not mentioned where those Precedents are to be found, which is a cautious way to prevent Mistakes; however, I will put him in Mind of some Precedents where 'tis quite otherwise, *viz.* In *Aston's Entries*, 228. *plac.* 23. in *Liber placitandi*, *fol.* 106. *plac.* 1. and in 2 *Vent.* 63. all the Proceedings of the Commissioners of Bankrupts are set forth in the Declarations: Now when the Serjeant thinks fit to shew some Precedents where 'tis not set forth, a Man with very little Law, and less Logick, may conclude that the Precedents are both ways.

Mannin versus *Cary*.

Tempest. Hill. 8 W. III. Rot. 396.

London. CASE, &c. on a Bill of Exchange, setting forth the Custom of Merchants, &c. and that one John Perry drew a Bill upon the Defendant (but did not say according to the Custom of Merchants) payable to the Plaintiff, that the Bill was presented to the Defendant, who accepted it upon Condition to pay it with a Bank Bill, to which the Plaintiff agreed; then he sets forth, That the Defendant in Consideration thereof, promised to pay the Money in a Bank Bill, which should be of good and old Date, and assigns the Breach in giving him a Bank Bill, payable to one Philips, or Bearer, in which the Defendant had no manner of Interest; so that the Plaintiff could not receive the Money.

Upon non assumpsit pleaded the Plaintiff had a Verdict, and it was moved in Arrest of Judgment, That he ought to have alledged the Breach in the same manner as the Promise is laid, viz. That he did not pay the Money in a Bank Bill of old Date.

*1 Vent. 64. Sid. 440. And to prove this, the Case of * Wright and Johnson was cited; which was a Promise to deliver a Horse in as good Plight as he borrowed it, but that he did not deliver the Horse at all: After a Verdict for the Plaintiff the Judgment was arrested, because the Breach was not assigned as the Promise was made.

One of the Judges said, This was a strange Case, and so it is as Justice *Ventris* reports it; for certainly, if the Horse was not delivered at all, it could not be in as good Plight as it was borrowed.

But *Sidersin*, who reports the same Case, makes it a little plainer, *viz.* A Promise was made to *return* certain Horses by such a Day *in as good Plight* as they were at the Lending, *or to pay* 10 *l. for every Horse that was damnified*; and the Breach assigned was, That one of the Horses was not returned till such a Day after the Time appointed, and the other not *returned at all*; and this was held to be wrong, because the Assignment of the Breach did not pursue the whole Promise; for though the Horse was not returned, yet if the 10 *l.* was paid, the Plaintiff had no Cause of Action.

2. It was objected, That the Plaintiff had not alledged that the Bill was drawn by Perry, *secundum consuetudinem mercatorum*; but the Answer was, That it should be so intended, unless the contrary appear; And so the Plaintiff had Judgment.

Brereton

Bnereton & Ux' versus *Moyse*.

Mich. 9 W. III. Rot. 317.

Norfolk ff. CASE by Husband and Wife upon several Promises made to the Wife dum sola.

The Defendant pleaded the Statute of Limitations.

The Plaintiff replied, That on the 22. Januarii, 4 W. they filed an Original in Trespass quare clausum fregit against the Defendant, directed to the Sheriff of Suffolk, with an intent, that upon his Appearance they might declare in an Action of Trespass on the Case, and Process of Capias was continued against him till Appearance; and farther, That the Defendant assumpsit infra sex annos, &c. and upon Demurrer the Plaintiff had Judgment, but it was reversed upon the same Reasons, for which the Judgment in * Kinley and Hayward's Case was reversed, viz. because the Capias was never returned, and so not made a Record of Court.

* Antea 80.

Russell Vid' versus *Williams*.

Winford. Pas. 3 W. & M. Rot. 441.

London ff. CASE by an Administratrix, setting forth, That the Defendant was indebted to the Intestate, &c. which he promised to pay, &c.

The Defendant pleaded in Bar an Award made between him and the Plaintiff, viz. That the Defendant should pay the Plaintiff 7 l. 15 s. and both of them should be at equal Charge at the Payment of the Money, or the delivering a Note under the Hand of the Defendant for that Value; then he alledges, That semper paratus fuit from the Time of the Award made, and that he is still ready to pay the Money, and tendered a Note under his Hand unto the Plaintiff pro valore: And upon Demurrer to this Plea it was held, That the Award was void, because it was of one Part; for the Money was not awarded to be paid in Satisfaction or Discharge of any Thing, neither is it any Benefit for the Defendant.

But if the Award it self had been good, yet 'tis no Bar as here pleaded, because 'tis not executed either by Payment of the Money awarded, or by a Tender and Refusal, which in Law amounts to a Payment. Keilw. 121. a. Cro. Eliz. 66.

It was objected, That this Plea was ill for another Reason, viz. The Defendant had alledged, that semper paratus fuit to pay the Money, which signifies nothing without tendering it in Court, which ought to be done thus. ff. *Semper paratus fuit & adhuc existit*

ad

ad solvend' præfat' (the Plaintiff) *easdem septem libras, ac illas eidem* (the Plaintiff) *paratus ad solvend', idem* (the Defendant) *hic in curia profert, & hoc paratus est verificare, &c.* This is a proper Plea of a Tender of Money in Court.

Now, to prove that *semper paratus fuit, &c.* is no good Plea, without such a Tender in Court; the Serjeant hath cited two * Year-Books, which seem to prove the quite contrary; they are as followeth,

** 7 H. 4. 30. B. 8 H. 6. 25. B.*

If. A Man gives a Bond of 20 *l.* conditioned to pay so much Money to the Obligee as *N.* should allot, for certain Trespasses done by him; if an Action of Debt should be brought on this Bond, 'tis a good Plea to say that *N.* allotted 10 *l.* which he tendered to the Plaintiff, and he refused it, without alledging, that *semper paratus fuit*, or *tendering the Money in Court.*

That Book tells us, 'tis the same Law in Debt upon a Bond of Award; and the Reason is, because, in both those Cases, the Conditions of the Bonds are collateral.

But where a Bond is given for 20 *l.* conditioned for the Payment of 10 *l.* and an Action is brought on that Bond; if the Defendant pleads a Tender and Refusal of the 10 *l.* he must likewise alledge, that he was *semper paratus, &c.* and by his Plea tender the Money in Court; because the 10 *l.* in the Condition was always Parcel of the Sum in the Bond; but the Sums in the other Conditions abovementioned were not so.

Covenant.

Covenant.

THE Serjeant begins this Title with ſome Pleadings taken out of Juſtice *Warburton*'s Manuſcript; but without Term or Number-Roll; ſo that we do not know where to look for it but in his Book; which is weighty enough to make it a Precedent, had not ſo many Miſtakes in ſeveral Pages afforded us Room to make ſome Reflection.

Broke verſus *Fullerhurſt.*

London, ſſ. COVENANT upon an Indenture of Bargain and Sale, in which, amongſt other Things, the Defendant covenanted to make any further Aſſurance, which the Plaintiff's Counſel ſhould adviſe; And aſſigns the Breach, That Counſel had adviſed a Fine, which the Defendant was required to levy; and which he refuſed to do.

The Defendant pleaded, That the Plaintiff non requiſivit, &c. and thereupon they were at Iſſue: Which was never determined for ought I know; this being a Precedent out of Juſtice *Warburton*'s Manuſcript, without any Term, Year, or Number-Roll.

But there are ſome Parallel Caſes in our Books, which I ſhall mention, and what Reſolutions have been made therein.

Higginbottom's Caſe; which was an Action on the Caſe, upon a Promiſe to make ſuch an Eſtate to the Plaintiff, as by *his Counſel*, upon Requeſt made, ſhould be adviſed: Now it was held in that Caſe, That the Advice ought to be given to the Plaintiff, who is to certify it to the Defendant; becauſe 'tis the Plaintiff's Counſel who is to adviſe; That it cannot be inconvenient to the Defendant; for he is to do nothing till he hath Notice of the Advice, nor then without Requeſt to do it; and if the Plaintiff ſhould give Notice to make an Aſſurance, which was never adviſed by his Counſel, and ſuch Aſſurance is made, he ſhall never afterwards ſay, that the Counſel adviſed another Conveyance; if he doth, the Defendant is not obli- 5 *Rep.* 20.

ged to execute it; becauſe the Plaintiff is not to vary from his firſt Requeſt.

2 *Rep.* 3. Manſer's *Caſe.*

Beſides, The Defendant ought not only to have Notice of the Advice, and to be required to make the Aſſurance; but the Plaintiff muſt tender it ready down; and it muſt be ſuch as is reaſonable for the Defendant to execute.

Gifford verſus *Young.*

Wyrley. Hill. 35 & 36 *Car.* II. Rot. 455.

Eſſex, ſs. COVENANT upon a Marriage Settlement, ſetting forth, That Thomas Young, in Conſideration of a Marriage intended to be had between him and Margaret Abbot, and of 4000 l. Portion; and for ſettling the Land in the Name of the Blood of the ſaid Young, and for a Jointure for the ſaid Margaret, did covenant with George Gifford and Matthew Young, that he would ſtand ſeized of the Manor of Cranbrooke, &c. to the Uſe of himſelf and his Heirs, till the ſaid Marriage; and afterwards to the Uſe of himſelf for Life; then to Margaret for Life, for her Jointure; and after her Decreaſe, to the Uſe of the Heirs of her Body, to be begotten of the Body of the ſaid Thomas Young; and afterwards to his own right Heirs for ever.

Then there was a Covenant for himſelf and his Heirs, That the Lands were then of the yearly Value of 400 l. per Annum; and ſhould ſo continue, during the Life of the ſaid Margaret, if ſhe ſurvived.

That the Marriage did take Effect; and that the Wife ſurvived; but that the Lands were not worth 400 l. per Annum, but 165 l. and no more; and this he lays to his Damage of 2000 l.

This Action was brought by Gifford, the ſurviving Truſtee, againſt the Son and Heir of Thomas Young.

The Defendant pleaded riens per Diſcent, on the Day that the original Writ was brought by the Plaintiff.

The Plaintiff replied, That he and the other Co-truſtee did, after the Death of Thomas Young, viz. 12 Julii. 29 Car. 2. file an Original in Covenant againſt the Defendant Young, as Son and Heir of his Father, returnable tres Mich'; that the Defendant not appearing, the Sheriff returned nihil habuit; thereupon a Capias was awarded againſt him, returnable Octab' Hillarii; and ſo an alias Capias, and Continuances till Octab' Hillarii 31 Car. 2. then the Defendant appeared, and the Plaintiffs declared on the ſaid Original as now, mutatis mutandis, only they lay their Damages in this firſt Declaration only to 1000 l. but in the ſecond Declaration they were laid to 2000 l.

There

There was a Judgment by Default in this first Action, and a Writ of Enquiry returnable quinden' Paschæ; and so Continuances from Term to Term; and the last was from Octab. Hillarii, to Cro' Ascensionis Domini, which is the last Return of Easter Term; and afterwards, viz. post Octab' Hillarii, and before Cro' Ascensionis Domini, viz. 7 Martii 32 Car. 2. the other Trustee died, by Reason whereof the said original Writ abated; and that the Plaintiff being the surviving Trustee, had no Notice of his Death till the last Day of June next following; whereupon, on the 14 Day of July, 33 Car. 2. he recenter brought another Original against the Defendant, and declared therein on Covenant; and the Sheriff having, as before, returned nihil habuit, a Capias was awarded against him, to which he appeared; and thereupon the Plaintiff declared against him as aforesaid, and averred, that the Defendant had Assets by Discent from his Father in Fee, die impetrationis of the first Original by both the said Trustees; and likewise avers, that the Actions were both the same.

The Defendant rejoins, That the first Original being continued till Cro' Ascensionis Domini, and the Plaintiff not appearing at that Time, and there being no further Continuances, loquela remansit sine die; that Cro' Ascensionis Domini was on the 13th Day of May in that Year, and that the second Original was brought on the 14th Day of July next following, and not before; and upon Demurrer it was objected,

1. That there was a Variance between the Declarations, as to the Damages; for in the first it was laid to 1000 l. and in the last to 2000 l. which ought not to be; for the second Writ should be a Continuance of the first.

There was the like Variance in Fynch and Lamb's Case; but there being an Averment in that Case, (and so likewise in the present Case) That the Cause of Action was the same in both Declarations, and this being confessed by the Demurrer, it was held to be good. *Cro. Car. 294.*

2. The first Writ was abated by the Plaintiff's own Fault; for it appears, that the other Trustee died 7° Martii, 33 Car. 2. and the last Continuance of the first Original was from Octab' Hillarii 31 Car. 2. to Cro' Ascensionis Domini next following, which was two Years before his Death; so that the first Original was discontinued all that Time; and then the Plaintiff cannot have a new Writ by Journies Accompts; and 'tis not sufficient to alledge, that the other Trustee died after the last Continuance, because he ought to shew the certain Day of his Death; that it may appear to the Court he died between the Day from which and to which the Action was continued.

3. But the chief Objection was, That the second Writ was not brought in due Time, because the other Trustee dying 7° Martii, 33 Car. 2. the second Writ was not brought till 14 July following, which was four Months after his Death; and so it appears upon the Record it self, that the Plaintiff had not recenter prosecuted his second Writ; for so it must be in all Pleadings in Journies Accompts.

The aforesaid Case of *Lamb* and *Finch* seems to be an Authority against this Objection; which arising upon the Statute of Limitations, I shall set forth the Words of that Statute, before I write the Case.

ff. 'Tis enacted, That all Actions of Trespass, *&c.* shall be commenced within 3 Years after the Sessions of Parliament, or within six Years after the Cause of Action doth accrew, and not afterwards: Provided if the Defendant be outlawed in the Suit, and afterwards shall reverse the Outlawry, then the Plaintiff may commence a new Action within a Year after such Reversal, and not after.

Within 3 Years after the making this Statute, *viz. Anno* 2 *Car.* an Original was filed against the Defendant, and he was outlawed; and *Anno* 3 *Car.* the Outlawry was reversed, and within a Year after that Reversal, a new Original was brought against the same Defendant; and this was held good, and within the Statute; tho' * Justice *Winch* tells us, it ought to be brought immediately after the Reversal of the Outlawry.

* *Winch.* 82.

But I think this Matter is a little plainer express'd by another * Judge, *viz.* If an Action is brought by Original within Time, and the Defendant is outlawed, and then the six Years expire, and afterwards the Outlawry is reversed, that a new Original may be brought within a Year after that Reversal.

* *Jones* 312.

But the Plaintiff in this Case being an old Boucher of Grey's-Inn, and perceiving some Variety of Opinion of the Judges, as to this last Objection, would not proceed any further.

Knight versus *Green.*

Cooke. Hill. 1 & 2 Jac. 2. Rot. 1385.

Berks, ff. COVENANT against Husband and Wife, Administratrix of her former Husband, upon a Lease made to him for 99 Years, &c. wherein, amongst other Things, the Intestate covenanted not to assign the said Lease without Leave of the Plaintiff, and the Breach was laid for assigning without Leave; so that the Intestate in his Life-time did break the Covenant, and the Defendant also after his Decease dum sola fuit, (to whom Administration of her Husband's Goods was committed) and likewise the Husband and Wife, the now Defendants, did the like after Marriage.

Upon Demurrer to this Declaration, it was objected, That the Plaintiff should have shewed by whom the Administration was granted to the Widow, and by what Authority it was done.

This seems to be a very unreasonable Objection, that the Plaintiff, who was a mere Stranger, should shew who granted this Administration, and what Authority the Person had to do it: 'Tis true, if the *Plaintiff* himself had declared as an *Administrator*, he ought to have

have ſet it forth, and to ſhew what Authority he had to maintain the Action.

And to prove this there were two Caſes cited out of * *Style*, which Caſes are no more to this Purpoſe, than to ſhew the different Opinions of the two Chief Juſtices, *Rolle* and *Glynne*; for it was the Opinion of *Rolle*, That where an Adminiſtrator is Plaintiff, he need not ſay that Adminiſtration was granted *per loci Ordinarium*, or *cui pertinuit*, which is directly contrary to the Opinion of *Glynne* in the ſame Book: *ſſ.* That a Plaintiff who is Adminiſtrator, muſt ſhew by whom Adminiſtration was granted, that he may intitle himſelf to the Action; tho' 'tis not neceſſary to ſhew that the Perſon who granted it, had lawful Power ſo to do; for 'tis ſufficient to alledge, that it was granted by the Biſhop; unleſs 'tis in the Caſe of a peculiar Juriſdiction, and then you muſt alledge, that he had lawful Power. * 106. 453. *Sid.* 228.

Lucke verſus *Lucke*.

Cooke. Trin. 1 Jac. 2. Rot. 1709.

Suſſex, ſſ. COVENANT, &c. wherein the Caſe upon the Pleadings was thus: ſſ. Thomas Lucke being poſſeſſed of a Perſonal Eſtate, to the Value of 795 l. 7 s. 6 d. died inteſtate, but left a Widow, one Brother, two Siſters, and a Nephew of the whole Blood; and they being intitled to one Moiety of this Eſtate, and the Widow to the other, the ſaid Siſters, their Husbands, and the Nephew, by a Deed reciting the Premiſſes, and that they had received of the Plaintiff 387 l. 13 s. 9 d. in full Satisfaction of their Moiety, promiſed for themſelves and their Heirs, to ſave harmleſs and indempnify him (the ſaid Plaintiff) from all Perſons claiming any Share of the ſame.

The Breach aſſigned was, That Elizabeth Cambridge, Siſter, by the Father's Side, of the ſaid Thomas Lucke, claimed a Share in the ſaid Moiety; and in Order to recover the ſame, he libelled in the Eccleſiaſtical Court held at Wadhurſt; and thereupon taliter proceſſum fuit in eadem Curia, (but did not ſay where held) that ſhe obtained Sentence for 43 l. 1 s. 6 d. of which the Defendants had Notice; but did not ſave the Plaintiff harmleſs.

There was a Judgment by Default; and it was moved in Arreſt of Judgment,

1. That the Plaintiff was not a Party to the Deed; and yet the Defendants had promiſed to ſave him harmleſs, &c. but this Exception was over-ruled upon the Authority of * Cooker and Child's Caſe; which was thus, 2 Lev. 74.

ſſ. Debt on a Charter-Party, which was thus penned, *viz.* This Indenture Charter-Party witneſſeth, That *B.* by the Conſent of *C.* hath let a Ship (to the Defendants) for a Voyage, *&c.* and the Defendants covenanted to pay unto *B.* ſo much, *&c.* and they alſo co-

venanted with the ſaid *B. and likewiſe* with the aforeſaid *C.* to pay him 300*l.* The Action was brought by *C.* for this Money; now tho' he was no Party to the Deed, yet this being in Nature of a *Deed-Poll*, and not a Deed between the Parties, *viz.* between *B.* of the one Part, and the Defendants of the other Part, they may covenant in ſuch Deed with a Stranger, *viz.* with one who is no Party to it.

2. But the ſecond Exception was held incurable. ſi. That no Place was alledged where the Spiritual Court was held when the Decree was made; 'tis true, it was ſaid, The Court was held at Wadhurſt, yet after the taliter proceſſum fuit, he ſhould ſhew where thoſe Proceedings were, and 'tis not enough to ſay, in eadem Curia, becauſe that may be intended the ſame in Juriſdiction, and yet not held in the ſame Place.

There is no Book cited to warrant this Diſtinction, which ſeems very nice to me; for where a Man ſets forth, That a *Court was held at Wadhurſt*, and that it proceeded ſo far in the *ſame Court*, that Sentence was given, *&c.* why muſt thoſe Words (the ſame Court) be intended to be the *ſame* in Juriſdiction, and not the Court held in the *ſame Place*; eſpecially ſince the Place was mentioned juſt before?

Lambert verſus *Lane.*

Winford. Trin. 3 Jac. II. Rot. 1991.

Midd. ſi. COVENANT, &c. That if the Defendant ſhould by the Means or Procurement of the Plaintiff, obtain any Eſtate in a large Houſe in Middleſex; that then immediately afterwards, the ſaid Defendant at the Requeſt of the Plaintiff, would grant him a Leaſe of three Rooms in the ſaid Houſe for the Term of fifty Years.

There was a Bond of 200 l. for Performance of Covenants, and the Plaintiff averred, That by his means the Defendant had obtained a Term of ſixty Years in a large Houſe in Clarkenwell, and aſſigned the Breach of Covenant, in not making a Leaſe to him of three Rooms, &c. but that he had pulled it down.

There was a Demurrer to this Declaration, but it was never argued, ſo the Plaintiff had Judgment of courſe. But the Point intended to be argued was, ſi. Whether the Plaintiff ought to have alledged, That he had required the Defendant to grant a Leaſe? And it ſeems he ought not, becauſe the Defendant had diſabled himſelf ſo to do by pulling down the Houſe.

The Serjeant bids his Reader look into theſe Caſes following, which I have done, *viz.* 5 *Rep.* 20. *Fitz. Covenant.* 2, 29. 1 *Rep.* 25. *B.* 2 *Cro.* 875. 21 *Edw.* 4. 55 *B.*

That in the first Report is *Porter*'s Case, which was thus; The Husband devised a House to his Wife and her Heirs, upon Condition, That she upon advice of Counsel, in all convenient speed after his Death, should grant the same for Maintenance of a Free-School; the Wife entered, and nine Years afterwards she made a Lease thereof to *A.* for forty Years: It was held, That by making this Lease she had disabled her self to perform the Condition. 1 *Rep.* 25. *B.*

The 5 *Rep.* 20. is *Higginbottom*'s Case: It was a Promise to make such an Estate to the Plaintiff, as by his Counsel, upon Request made, should be advised; the Counsel gave Advice to the Plaintiff, who signified it to the Defendant, *and required* him to perform it; but the Question was, Whether the Counsel should be given to the Plaintiff or to the Defendant? And it was held, That it should be given to the Plaintiff, and he was to certifie it to the Defendant. 5 *Rep.* 20.

All that can be collected from these Cases relating to the Point above-mentioned is, That in *Porter*'s Case, there was a *Disability* in the Woman to perform the Condition, and therefore it had been impertinent to require her to perform it; but in *Higginbottom*'s Case he was not disabled to make a Title to the Plaintiff, and probably, that might be the Reason why a *Request* is alledged for him to do it; though it was not the Point in that Case, nor was there any Debate about it.

All the other Cases cited, as *Fitz. Covenant* 2. *&c.* are nothing to the purpose for which they are cited.

Brailsford versus *Parsons.*

Belvin. Mich. 3 Jac. II. Rot. 350.

Derby ss. COVENANT, &c. upon a Lease of a Capital Messuage and Lands, &c. rendering Rent, in which, amongst many other, the Defendant covenanted to Repair the Buildings with all needful Reparations, principal Timber only excepted: And the Breach assigned was, That after the Demise, two Barns, Parcel of the Tenements demised, were in Decay for want of Thatching and Walling, and not for want of principal Timber.

The Defendant, protestando that the Barns were not in Decay, pleads, That he was ready at his own Charge to repair them where it was necessary (principal Timber only excepted) but further saith, That there was a Necessity for two principal Beams of Timber to support the said Barns, of which the Plaintiff had notice, but refused to deliver them.

Upon Demurrer to this Plea the Plaintiff had Judgment, because the Defendant had given no manner of Answer to the Breach particularly alledged in the Declaration, which was not for want of Timber, but Thatching.

Besides,

Beſides, the Plaintiff is not obliged to deliver the Timber, for the Exception amounts to no more than that he was to provide it ready for the Defendant to carry.

Now if he had alledged that the Plaintiff did not provide it ready for Carriage, this would not have been very material, becauſe 'tis no more than what is implied by the Plaintiff himſelf in aſſigning the Breach; for he ſets forth, That the Buildings were in decay for want of Thatching, and not for want of Timber; which laſt Words imply, That he had provided none becauſe it was not wanting.

And therefore, if he had replied to the Defendant's Plea, he could not have ſaid, That he provided or delivered Timber, for that had been a plain Departure from thoſe negative Words in the Bar.

The Serjeant ſays, It had been a Departure from the Bar, but that muſt be a plain Miſtake; yet as often as he is miſtaken in ſuch Matters, I find he never departs from his conſtant Method of enlarging his Book by long and tedious Declarations, which can neither edify the Reader, or ſerve for Precedents; and I muſt confeſs I cannot help reflecting, when I ſee a long Leaſe turned into barbarous *Latin*, and cramm'd into a Book for no other purpoſe than to ſtuff out nine Pages, when the Point upon which the Queſtion doth ariſe, might be ſtated in nine Words.

But in this Caſe you will ſee the Date of the Indenture, the Names of the Parties, the Conſideration it ſelf, the Demiſe of the Lands, all the Exceptions of Underwood and Coal, with Power reſerved for the Leſſor to fell the ſaid Wood, making reaſonable Allowance for the Damages done in digging the Ground; then you will find the Rent reſerved, and a Proviſo for Re-entry upon Non-payment; and next follows a whole Regiment of Covenants, *viz.* To repair the Buildings, to deliver Goods at the end of the Term in a Schedule annexed, that the Leſſor ſhall enter and view the Buildings, and give notice of the defects of Repairs; that the Leſſee ſhall repair within a Month after Notice; that if the Leſſor ſhall pull down the Kitchin, the Leſſee ſhould carry Materials to rebuild it; with many other Covenants, which are too tedious to tranſcribe.

Now I would fain know, Whether all this and a great deal more of the like Nature can be inſtructive to the Reader? I am ſure there was no occaſion for printing it as a Precedent, unleſs the Authority of a great Name, and the Bulk of the Book, can add any Weight to it: But great as it is, it might ſtill have been greater by the Help of ſome little Authors of the Law; ſuch as *the Clerk's Tutor* and *Scrivener's Guide*, where the Reader may find a plentiful Crop of ſuch Precedents.

Levett verſus *Withrington.*

Belvin. Trin. 3 Jac. II.

London ſſ. COVENANT upon an Indenture, reciting a Leaſe made by David Bigg to the Defendant, of a Meſſuage, &c. in the Pariſh of St. Giles in the Fields; Habendum for fifty five Years, rendering Rent; That the Defendant aſſigned the ſaid Term and Eſtate to the Plaintiff, and covenanted, That the Original Leaſe was good, and not made void or incumbered, &c. then he aſſigned the Breach, viz. That two Perſons (naming them) claimed a Title under the Defendant to part of the Premiſſes, by Vertue of a Leaſe which he made to them.

The Defendant pleads as to Parcel, That the ſaid Perſons had no Title under him; and as to the Reſidue, That the Plaintiff had Notice of the Leaſe before the Aſſignment was made to him, and that one of thoſe Perſons after the Death of the other, attorned Tenant to the Plaintiff.

Upon Demurrer to this Plea the Plaintiff had Judgment.

This is all that is material in this Declaration, but the Serjeant hath made ſix Pages of it, for he hath tranſcribed all the Covenants which do not concern the Caſe, and which are made on the Part of the Plaintiff, *viz.* That he ſhould pay the Rent reſerved on the Original Leaſe, that he ſhould perform all the Covenants therein, which the Aſſignor was bound to perform, and ſhould indempnify him from the ſaid Covenants: But he tells us the Plaintiff had Judgment; he has given no Reaſon for it, which puts me in Mind of what has been obſerved by another, *viz.* That the ſame happy Talent of Mind in ſome Men, makes them abound in trivial Matters, and very defective in what is material.

Reeves verſus *Sheppard.*

Tempeſt. Hill. 3 & 4 Jac. II. Rot. 1769.

Midd. ſſ. DEBT upon Bond for Performance of Articles brought by the Plaintiff as Adminiſtrator of William Waite.

The Defendant pleaded, That the Articles were made between him and the ſaid Waite, reciting, that Waite was intitled in the Right of his Wife to the Heirs of one Amery's Eſtate, whoſe Widow ſhe was, That the Defendant married the only Daughter and Heir of the ſaid Amery, and ſo became intitled to the Profits of his real Eſtate, and liable to pay the Thirds thereof, which being uncertain it was agreed between them, That *Waite* ſhould accept 10 *l.* yearly during the Life of his Wife, in lieu of her Thirds, which

the Defendant covenanted to pay to the ſaid Waite, by half-yearly Payments for ſo long Time as his Wife ſhould live; and then pleads Performance.

The Plaintiff replied, That Waite's Wife lived after Lady-Day, 1 Jac. 2. and that 5 l. was due to the Plaintiff after the Death of Waite, for half a Year, &c. And upon Demurrer it was held, That it was the Intent of thoſe Articles that the 10 l. ſhould be paid only during the Joint Lives of the Husband and Wife, and he dying firſt, nothing could be due after his Death.

Lee verſus *Johnſon.*

Cooke. Hill. 3 & 4 Jac. II.

York ſſ. COVENANT on a Leaſe of a Houſe for Years, in which the Leſſee covenanted to repair it at his own Charge, and all * Goytes, Ditches, Bridges and Fences, with Banking, Cleanſing and Fencing during the Term, &c.

* A *Yorkſhire* Word for Streams.

The Breach aſſigned was, That the Houſe and twenty Perches of Bank, ten Bridges and forty Perches of Fence were broken, pulled up, beat down and ſpoiled: And upon Demurrer it was objected, That the Breach was too general; but the Anſwer was, That it was aſſigned according to the Words of the Covenant, and ſo well enough.

In theſe three laſt Caſes there is not one Book cited, which muſt be a ſure way to prevent Miſtakes, and I cannot help ſaying, thoſe are very common, eſpecially in the digreſſive Part of theſe mighty Volumes.

Aldworth verſus *Hutchinſon.*

Winford. Paſ. 4 Jac. II. Rot. 322.

Berks ſſ. COVENANT, wherein the Caſe upon the Pleading was thus:

If Joſeph Aldworth was outlawed in London at the Suit of one Stonehouſe, and a Special Capias utlagatum was directed to the Sheriff of Berks to take him, that at the Time of iſſuing out of the ſaid Writ, the Plaintiff Katherine Aldworth, owed 100 l. to the ſaid Joſeph, which appeared upon the Return of the Inquiſition, and that the Sheriff attached it in her Hands, but could not get the actual Poſſeſſion thereof.

That

That after the Inquiſition taken, and before the Return, Katherine, the Plaintiff, paid 64 l. to the Defendant, at the Deſire, and by the Appointment of the ſaid Joſeph Aldworth; and thereupon the Defendant Hutchinſon, by his Deed reciting the Premiſes, covenanted with the Plaintiff to ſave her harmleſs from all Suits which might ariſe, by Reaſon of the Payment of the Money, as far as that Sum would amount; and ſo as ſuch Suit ſhould be brought againſt her before the End of Michaelmas Term next enſuing; and the Plaintiff averred, That the Defendant did not pay the ſaid 64 l. to the King (being forfeited to him by the Outlawry) or to the Plaintiff; that a Tranſcript of the Record of this Outlawry, and of the Inquiſition, was certified into the Exchequer in Michaelmas Term, 2 Jac. 2. and in the ſame Term a Sci. fa iſſued againſt the Plaintiff, to ſhew Cauſe why the King ſhould not take out Execution againſt her; and upon a Scire feci returned, and the Plaintiff ſhewing no Cauſe, there was Judgment againſt her by Default; and ſo ſhe became liable to ſatisfy the ſame Judgment out of her own Eſtate.

The Defendant, proteſtando that the Plaintiff was not damnified before the End of Michaelmas Term, pleaded, That the Sci. fa. iſſued out of the Exchequer after the ſaid Term was ended, viz. 30 Novembris 2 Jac. and traverſed that it iſſued forth before the End of the Term.

The Plaintiff replied, That the Sci. fa did bear Teſte on the laſt Day of the ſaid Term, prout patet per recordum; then he avers his Plea, but did not ſay per recordum illud, and demands Judgment, If the Defendant ſhall be admitted to deny it, contrary to the Writ it ſelf? And upon Demurrer it was objected to the Declaration,

1. That the Plaintiff had not alledged, That the Capias Utlagatum was ſued in Term-Time; but the Anſwer was, That it was a judicial Writ; and it being the uſual Courſe to proſecute ſuch Writs in Term-Time, the contrary ſhall not be preſumed, where there is no Cauſe for ſuch Preſumption.

To prove this, there are three Books cited; the firſt is * *Latch*, where Juſtice *Doderidge* was of this Opinion. * *Latch.* 11.

The other two Books are *Jones* and 1 *Vent.* where the ſame Caſe is reported by both; but very little relating to this Purpoſe. 2 *Jones* 150. 1 *Vent.* 362.

ſſ. It was an Action of Eſcape brought againſt a Sheriff, ſetting forth, That he arreſted a Perſon, at the Suit of the Plaintiff, by a *Latitat*, ſued out 21 *Januarii*, and the Jury found that it bore *Teſte* 28 *Novemb.* but in Truth was taken out 21 *Januarii*; and the Queſtion was, Whether this was the ſame *Latitat* ſet forth in this Declaration, becauſe by Law it muſt be intended to be taken out on that Day in which it was teſted, &c? But it was held, That tho' this was *veritas Legis*, yet that ſhall not eſtop the Jury to find *veritatem facti*.

Theſe Books may be pertinent enough to the Objection made againſt the Plea; but I think they do not concern any of thoſe above-mention'd.

2. The Plaintiff did not allege, That the Deed was Sigillo ſuo (viz of the Defendant) ſigillat'; but this Objection was not allowed, becauſe 'tis ſet forth that the Defendant convenit, which includes Sealing; and there is no Occaſion of ſetting forth all the Circumſtances which compleat a Deed.

4 Leon. 175.

Sid. 429.

3. Then as to the Replication, the Plaintiff need not ſay, & hoc paratus eſt verificare per Recordum illud, for 'tis well enough without thoſe Words, it being upon a general Demurrer.

But on the other Side the chief Objection was, That the Defendant ought not to be admitted to plead that the Sci. fa. was ſued out at any other Time than when it bears Teſte, for that is properly the Time emanationis brevis.

Sid. 271.

As for Inſtance: A Bailiff takes Goods in Execution by Vertue of a *Fi. fa. Teſte*, 4 *Junii*, but not taken out till 11 *Junii*; and on the *ſixth Day* of that *June*, the Owner of the Goods became a Bankrupt; and in Trover brought againſt the Bailiff; it was held, that the Goods were liable to the Judgment from the Time of the *Teſte* of the *Fi. fa.* for that is properly the Time *emanationis brevis*; and ſo the Execution well ſerved.

F. N. B. 78. *B.* 1 *Rol. Abr.* 823.

F. N. B. is nothing to this Purpoſe; and all that is ſaid in *Rolle* is, That the Property of the Goods is bound from the *Teſte* of the Execution.

Now if, in Judgment of Law, this *Sci. fa.* may be ſaid *emanare*, at the Time when it bears *Teſte*, which was on the laſt Day of *Michaelmas* Term, tho' it was not actually taken out till the Term was ended; and if the Defendant is eſtopped to ſay the contrary, becauſe that would be to aver againſt a Record, which this Writ is; then the Conſequence would be, that this Covenant likewiſe in Judgment of Law muſt be broken; becauſe, if the *emanatio brevis* relates to the *Teſte*, *&c.* then the Suit was proſecuted *before the End of Michaelmas Term*, tho' in Fact the Covenant was not actually broken, becauſe the Writ was taken out afterwards.

But to obviate ſuch an Abſurdity, the later Authorities incline, That tho' one cannot properly aver againſt a Record, yet he may ſet forth the very * Day and Time when the Writ was purchaſed; for otherwiſe this Relation to the *Teſte* would be an apparent Injury, and juſtify a Wrong, when by Law 'tis only intended to prevent a Fraud.

* *Raym.* 161.

Judgment was given for the Plaintiff, niſi cauſa, &c.

Tuckerman versus *Tuckerman.*

Tempeſt. Paſ. 4 Jac. 2. Ro: 590.

Devonſhire, ſſ. DEBT againſt an Adminiſtratrix, upon a Bond which the Inteſtate her Husband made for Performance of Covenants in a Leaſe, &c. reciting, That the Plaintiff Suſan was poſſeſſed of a Leaſe for Lives, &c. and that it was agreed between the Plaintiff and the Inteſtate, that the Plaintiff, in Conſideration of a Rent to be paid to her yearly by the Inteſtate, &c. ſhould convey all her Intereſt in the ſaid Leaſe to him, except that ſhe ſhould have every Year 200 Furze or Wood-Faggots.

The Defendant pleads Performance.

The Plaintiff replied, and aſſigned the Breach, that ſhe had not 200 Faggots, &c. of the Inteſtate every Year; but that 800 were due to her from him, and from the Defendant after his Death.

And upon Demurrer, the Defendant had Judgment, becauſe the Deed, as to this particular Matter, did not amount to a Covenant, that the Inteſtate ſhould deliver ſo many Faggots; but it was a reſerved Liberty for her to take them upon the Land; which differs from a Covenant.

Beſides, the Plaintiff had not ſhewed how many Faggots were due from the Inteſtate, and how many from the Defendant ſince his Death; which ought to be done, becauſe diſtinct Anſwers might be given in Excuſe.

There is no Book cited in this Caſe; but I think 'tis plain that theſe Words, ſſ. *Except that ſhe ſhall have* 200 *Faggots*, do not amount to a *Covenant*, becauſe it doth not conſiſt with the Definition of the Word; for a Covenant is a Clauſe of an Agreement in a Deed, by which either Party is bound to do, perform, or give ſomething to the other.

Now, here is nothing to be done, performed, or given to the Plaintiff, but only a Liberty reſerved for her to take it.

Major & Ux. verſus *Peck* & Ux.

Mich. 3 W. & M. Rot. 395.

London, ſſ. COVENANT by an Adminiſtrator de bonis non, &c. during the Minority of Rebecca Wood, brought againſt Husband and Wife, who was Executrix of her former Husband, reciting, That John Wood demiſed a Meſſuage, &c. to Richard and Benjamin Wood for 21 Years, rendring Rent, and that the Leſſees covenanted jointly to pay it.

That the Leſſor, John Wood, made his Will, and appointed his Wife Deborah Executrix thereof, and that Richard Wood made his Wife Urſula Executrix of his Will.

That Deborah, Executrix of the Leſſor, died inteſtate, leaving Rebecca Wood, an Infant, and that Adminiſtration of the Goods of her Husband, John Wood, unadminiſtred, was committed to the Plaintiff Thomas Major, until Rebecca ſhould be of Age.

That Urſula, the Widow of Richard Wood, married the Defendant Daniel Peck; and that after the Death of the Leſſor and his Wife, and after the Marriage of the Defendant with Urſula, there was 87 l. due for Rent.

Then he avers, That Rebecca is under Age.

The Defendants plead in Bar, That puis darrein continuance Rebecca came of Age.

The Plaintiff demurred; but it ſeems he could not maintain his Demurrer, for it was never argued; ſo there was no Occaſion for the Defendants Counſel to ſpeak; but rather than we ſhould loſe the Benefit of the Serjeant's Argument, who was retained for the Defendants, he has told us what he intended to inſiſt on.

ſſ. That the Plea was good; for as ſoon as Rebecca came of Age, there was an End of this Action.

Now to maintain this Allegation, the proper Way had been to produce ſome Authorities to prove, that an Adminiſtrator cannot proceed *in any Action brought by him* after his Power is determined.

But inſtead of that he has mentioned ſome Caſes, which prove where Actions are brought *againſt, and not by Adminiſtrators*, during the Minority of others, that as ſoon as they come of Age *pendente placito*, the Actions are abated.

Goldſ. 136. So is the Caſe in *Goldsborough*; but that Caſe which is not printed, *viz. Paſ.* 3 *W. III. B. R.* but no Number-Roll, comes nearer to the Point. ſſ. It was a Sci. fa. brought by an Adminiſtrator, during the Abſence of another, to whom of Right it belonged; and upon Demurrer the Adminiſtration was held good: In which Caſe the Court held, That the Actions brought by ſuch an Adminiſtrator ſhall be abated when the right Perſon comes; yet Actions brought againſt him ſhall not.

If

If an Administrator, durante minori Ætate of the Executor, should obtain a Judgment, and then the Executor comes of Age, 'tis he, and not the Administrator, shall have a Sci. fa. 1 Rol. Abr. 888. 2 Brown. 83.

So if an Administrator hath a Judgment, and before Execution the Administration is repealed, the Debtor may have an Audita querela against such Administrator, to prevent his taking out Execution; and tho' Execution should be executed, yet the Party may be relieved by that Writ. 1 Mod. 62. 2 Saund. 148. idem, *and not* 48.

Yelverton is cited for this Purpose, but that Book doth not warrant this last Assertion; the Case there is thus: *ff.* An Administrator had a Verdict in Trover, and before the Day in Bank, the Defendant pleaded that the Administration was revoked; this was held an ill Plea, because the proper Remedy had been an *audita querela*; but this was not after Execution executed. *Yel.* 125.

Another Objection was, That there was a Variance between the original Writ and the Declaration; for the one was brought by Thomas Major, as an absolute Administrator, viz. bonorum of John Wood unadministred, and the Declaration was as an Administrator, &c. durante minori Ætate, &c. which is a qualified Administration; and so it ought to be in the Writ it self. Aston 218.

Pyke versus *Pulleyn.*

Winford. Trin. 5 W. & M. Rot. 660.

London, *ff.* COVENANT, &c. brought by an Attorney, reciting Articles of Agreement, by which Thomas Pyke, Vicar of Southo, in the County of Huntingdon, was to permit the Defendant to receive to his own Use Tythes of the said Vicaridge for one Year, and which should be due to him at Michaelmas following; and likewise that the said Thomas Pyke, if required, should grant the said Tythes to the Defendant, for so long Time as the said Pyke should live; and this was to commence from the said Michaelmas; and that the said Thomas Pyke, at the Request of the Defendant, should by all lawful Means resign the said Vicaridge to the Bishop of the Diocese, so as the Defendant might present another; and the said Defendant agreed to pay the Plaintiff 15*l.* for and in lieu of the said Tythes; then he avers that Thomas Pyke had performed all on his Part, but that the Defendant had not paid the said Money.

The Defendant pleads in Bar, That Thomas Pyke died at Southo before Michaelmas, upon whose Death the Right which he had to the said Tythes was determined; so that the Defendant could not take them for a Year, according to the Agreement in the said Articles; and upon Demurrer, it was objected against the Bar,

ff. That

ff. That the Action was laid in London, and the Defendant pleaded, That Tho. Pyke died at Southo; which ought not to be so pleaded, because the Death of the Vicar was not a local, but a transitory Thing; and therefore he should have alledged, that Pyke died in the Place where the Action was brought.

Now, tho' this may be according to the Form of Pleading, yet 'tis not properly expres'd in the Book, nor very well proved by the Authorities there cited.

Cro. Eliz. 184. ff. The Case in *Croke* is thus: ff. False Imprisonment at *Bristol*; the Defendant justified that he arrested the Plaintiff at *Glocester* by a Commission of Rebellion, and traversed that he was guilty at *Bristol*: It was the Opinion of *Wray* alone, that the Traverse was not good, because the Cause of Justification, *viz.* the Arrest, was not local, but transitory.

1 *Saund.* 84. And the Case in *Saunders* is no more than a *Nota* of the Counsel, *viz.* The Trespass was laid at *Castleton*, and the Defendant justified at *another Parish*; the Book is, *Nota* the Plea was ill, because he ought to justify in the *same Place* where the Trespass is laid.

Now if the Opinion of a single Judge, and the *Nota* of a Counsel taken both together, are of any Authority, then this Point is well proved.

But I must confess *Sid.* 234 comes up to the very Point; for there, upon Debate, it was adjudged, that the Defendant cannot by his Plea change the Venue in a transitory Thing.

But the chief Objection was, That this is a simoniacal Agreement, viz. to resign upon Request.

Cro. Car. 425. *is in Point.* Those who argued on the other Side, admitted, That if the Agreement had been to resign in Consideration of Payment of the 150 l. or upon any express Consideration, that it had been simoniacal; but the Agreement to pay the Money is a distinct Covenant, and independent upon the rest, and made upon a good and lawful Consideration; and therefore, without an express Averment that it was simoniacal, it shall never be intended.

But notwithstanding this Answer, the Court held the Contract to be simoniacal; and so the Plaintiff had Judgment.

And now we are come to the digressive Part of the Case, where the Serjeant advises his Reader to look into some Books; but for what, let him judge; I think they do not at all relate to the Question in the principal Case, and that he might have shewed as much Learning, if he had bid us look into the 40th Canon, made in the Year 1603, where we may find the Oath against Simony it self.

The Cases are *Cro. Car.* 61. which was a *quare impedit*, to present upon the *Resignation of P.*

31 *Eliz. cap.* 6. The Defendant confessed, that *P.* was presented *pro quadam pecuniæ summa*; then he pleads the Statute of Queen *Elizabeth* against *Simony*, which made the *Presentation void*, and that the King presented the Defendant; and *traversed* that the Church was void by *Resignation*: And upon Demurrer to the Plea, it was objected, That it was double, because the Defendant confessed the Presentation of *P.* and avoided it by Simony; and he ought to have rested there, and

not to traverſe the *Avoidance by Reſignation*; but it was held, that the *Preſentation* was but conducing to the *Reſignation*; and that being the chiefeſt Thing, ought therefore to be traverſed.

Now, I would fain know how this Caſe proves, that a Contract *to reſign upon Requeſt* is ſimoniacal?

I cannot imagine for what Purpoſe *Littleton*'s Report is cited, unleſs 'tis becauſe the Word Simony is to be found there; and ſo it is in *Littleton*'s Dictionary, which might have been cited with as much Reaſon; for 'tis as pertinent to the principal Caſe: 'Tis thus, *ff. S.* was preſented, inſtituted and *inducted* to a Church, which became void by Simony; the Incumbent appeals to the Eccleſiaſtical Court, but a Prohibition was granted, becauſe, after *Induction*, which is a temporal Act, they have nothing to do with the Inſtitution: Now is not this a rare Caſe to prove that a Contract *to reſign upon Requeſt* is ſimoniacal? *Lit. Rep.* 177.

But the Serjeant, to ſhew his Reading, proceeds to * another Caſe, and that is to prove Simony to be an Offence only againſt the Canon Law; but I think he ſhould have told us what Simony is by that Law, becauſe we have no Notion of the Word by any other Law; for 'tis not ſo much as mention'd in the Statute 31 *Eliz.* That only inflicts particular Penalties upon ſome notorious Act relating to Benefices, but doth not determine what Simony is; and yet it hath done more good than all the Canons made againſt it; for it makes the Preſentation void, and diſables the Patron *pro hac vice* to preſent again; whereas, before the making this Act, the Patron had no Manner of Puniſhment by the Canon Law as to the Preſentation, becauſe a Canon, not confirmed by an Act of Parliament, could not determine any Man's Right. * *Moore* 564.

Neither was the Perſon, who came in by Simony, in very great Danger of Puniſhment by that Law, becauſe he held his Living until he was deprived by a Sentence in the Spiritual Court, which he often eſcaped for want of Evidence; as 'tis required by their Law.

This and a great deal more might be ſaid, but it doth not concern the chief Point in the principal Caſe; which is, That *an Agreement to reſign upon Requeſt is Simony.*

'Tis true, the Statute tells us, That a *corrupt Reſignation* is unlawful; but it hath not the ſame Penalties as a *corrupt Acceptance* of a Living; for he that *reſigns* for any Manner of Benefit, forfeits double the Value of what is given, *&c.* but he who corruptly *accepts*, *&c.* is diſabled from holding it.

And now at laſt the Serjeant tells us, That in *Mackabar* and *Siderick*'s, which he miſtakes for * *Mackaller* and *Coderick*'s Caſe, a Promiſe made to pay Money in Conſideration that the Plaintiff would procure the Defendant to be *preſented* to a Living, was unlawful, becauſe 'tis a ſimoniacal Contract, which is as much to the Purpoſe as any of the Caſes cited before. * *Cro. Car.* 337. 353. 361.

Brooke versus *Fowett.*

Tempeſt. Hill. 5 W. & M.

York, ſſ. COVENANT upon a Leaſe of a Houſe, rendring Rent, in which there was a Covenant to repair; and the Breach aſſigned was for Non-payment of 31 l. Rent, and for not repairing.

The Defendant as to the Rent, pleads in Bar, That he paid the Plaintiff 5 l. 5 s. before the Action brought, which he accepted in full Satisfaction of all Rent; and as to the Repairs, he pleads, That as often as the Houſe was in Decay he repaired it; and traverſed that it was out of Repair.

The Plaintiff replied, That the Defendant did not pay the ſaid 5 l. 5 s. and that the Houſe was out of Repair; and thereupon they were at Iſſue.

This is all the Caſe, which ſerves well enough to fill up four Pages in the Book; it can be of no other Uſe, for 'tis a common Declaration; and we find ſeveral Pleas where * Acceptance of Rent, or of a Sum of Money, is pleaded in Bar to the Action.

* *Herne* 276. *Raſt. Ent.* 252.

There is a very nice Diſtinction made in † *Pinnel's* Caſe, which agrees very exactly with this Plea, *viz.* That where a leſs Sum is paid in Diſcharge of a greater, in pleading it 'tis not ſufficient for the Defendant to ſay, That the Plaintiff *accepted it* in Satisfaction, but he muſt alledge, that he *paid it* in Satisfaction; and the Reaſon is, becauſe the Manner of Payment muſt be directed by him that pays, and not by the Receiver.

† 5 *Rep.* 117. *Cro. Car.* 193.

Lamplugh verſus *Shiers.*

Winford. Mich. 10 W. III.

Midd. ſſ. COVENANT, &c. wherein the Caſe upon the Pleading was thus: Sir Thomas Aſhby being ſeized in Fee de una pecia Terræ in the Pariſh of St. Margaret, Weſtminſter, demiſed the ſame to John Griffin for 61 Years, in Conſideration that he ſhould build 15 Houſes there, and pay the yearly Rent of 100 l.

That the ſaid Aſhby being ſeized of the Reverſion, granted the ſame to Sir Philip Meadows and his Heirs.

That Sir Phillip Meadows by Leaſe and Releaſe remiſed, releaſed and confirmed the Revertion of the Premiſſes to the Plaintiff Thomas Lamplugh, who by Vertue of the ſaid Releaſe was ſeized, &c.

That the Eſtate and Intereſt of Griffin came by meſne Aſſignments to the Defendant Elizabeth Shiers, that there was 550 l. Rent in Arrear, and that after the 15 Houſes were built, one of them was burnt down.

To this Declaration the Defendant demurred, and it was objected,

That the Plaintiff had alledged that Sir Philip Meadows did remiſe, releaſe and confirm the Reverſion, &c. which Words made the Declaration double; for he ſhould only have ſaid that he releaſed, &c. but having multiplied ſo many Words, the Defendant could not tell which to anſwer.

The Objection was not allowed, becauſe where many Words have the ſame Signification, they ſhall not be taken to be double: Beſides, in this Caſe the Plaintiff relied on the Releaſe, for he ſaid, virtute of the Bargain and Sale and of the Releaſe, he was ſeized; ſo he waived his Title by Confirmation.

There was a Caſe cited out of *Palmer* to prove this: It was a *Quo warranto* againſt the Defendant, for claiming a Foreſt; he pleaded, That the King granted it to the Earl of *Shrewsbury*, who *dedit, feoffavit, barganizavit, vendidit & confirmavit*, the ſame to him: It was objected that the Plea was double; 'tis true, the King had Judgment, not becauſe there were too many Words in the Plea, but becauſe there were too few in the Patent to paſs this Foreſt. *Palm.* 62.

The Serjeant tells us, that in *Brooke*, Tit. *Double Plea*, there are many Caſes, which is very true; for there are 162 Caſes, and few or none relate to this Point; and by this we may ſee, that he did not deſign to handle this, nor many other Caſes, ſo as to diſcourage the Induſtry of his Reader in ſearching, tho' to little Purpoſe; and therefore I think he might have referred him to *Fitz. Abr.* Tit. *Double Plea*, as well as to *Brooke*; for all that I can find in the later is, that * *conceſſit & confirmavit* doth not make a Plea double; that in Treſpaſs for aſſaulting and threatning the Plaintiff, the Words † *dixit, retulit & publicavit*, and ſuch like, make it neither double or treble; but that which comes nearer to the Caſe is, That if the Plea ſhould be double, yet if the Defendant relies upon one ** ſingle Point (as in this Caſe he did upon the *Releaſe*) then 'tis not double.

* *Bro. Abr.* Tit. Double Plea. *Placito* 9.
† *Placito* 73.
** *Pl.* 147.

2. It was objected, That the Plaintiff had not ſet forth that Sir Philip Meadows was ſeized of the Reverſion at the Time of the Releaſe made.

But it was anſwer'd, That the Reverſion ſhall be intended to continue in him, it being an Eſtate in Fee: And to prove this, *Plowd.* 431 was cited: I have read over the Page as carefully as I can, and find nothing to this Purpoſe.

The next is *Jones* 181, 182. *ff.* A Writ of Error was brought to reverſe a Fine, levied by Tenant in Tail; and an Objection was made, That 'tis not alledged, the Conuſor was Tenant in Tail at the Time of the Fine levied; but it was anſwered, That where a Seiſin of an Inheritance is once alledged, it ſhall be intended to continue until the contrary is ſhewed; which is a pretty good Authority againſt this ſecond Objection.

3. It was objected, That the Plaintiff ſhould have declared, That Sir Philip Meadows releaſed totum jus, &c. and not the Reverſion; but the Anſwer was, That it appears he had only a Reverſion in Fee; and if ſo, then to grant ſuch a Reverſion and totum jus, is but one and the ſame Thing.

And

Dyer 159. *a.* And to prove this, *Dyer* was cited; where the Serjeant tells us, we may find, that a Demiſe of the *Reverſion*, and of the Land it ſelf, when it ſhall revert, is one and the ſame Thing; but there is no ſuch Thing in that Page.

4. **The laſt Objection was, That this Action was brought by the Plaintiff, as Aſſignee of Sir** Philip Meadows, **who was Aſſignee of the Leſſor; but in the Conveyance of the Reverſion to Sir** Philip, **'tis alledged, That the Bargain and Sale was made** inter quoſdam Philippum Meadows, per Nomen Philippi Meadows, **which might be intended a diſtinct Perſon from him who was named before.**

This was a very nice Objection, but it was not much regarded; for the Court was of Opinion, That there was no Room to intend theſe to be two Perſons; it ſeems there was another Reaſon given; but the Serjeant tells us, he did not hear it: 'Tis true, the Loſs of Hearing is uſually a Sign of old Age, as that ſhould be of Wiſdom and Experience; and yet we ſee that ſome Men of Years, who have that Senſe well enough, do ſo diſguiſe thoſe Reaſons which they hear, by repeating them to the World, that 'tis very improbable the Reader ſhould be the wiſer for what was either miſtaken or miſunderſtood by the Writer.

But nothing reported in this Caſe was ſo ſure as that Judgment was given for the Plaintiff, and that the Serjeant was Counſel for him.

Snow verſus *Franklyn.*

Tempeſt. Trin. 12 W. III. Rot. 305.

Rutland, ſſ. COVENANT in Conſideration the Plaintiff would ſuffer *S. P.* to enjoy a Farm in Clipſham for a Year, under the Rent of 72 l. per Annum, that the Defendant would pay to the Plaintiff 200 l. which was in Arrear for Rent, and alſo the ſaid 72 l. And the Breach aſſigned was for Non-payment of the ſaid 72 l.

The Defendant pleaded in Bar, That before any Cauſe of Action did ariſe for Breach of Covenants, &c. it was agreed between the Parties, that the Defendant ſhould pay the Plaintiff 30 l. in Diſcharge of all Covenants, which Sum the Plaintiff received and accepted in full Satisfaction thereof; and upon Demurrer the Plaintiff had Judgment.

Becauſe upon the Defendant's own ſhewing, there was no Covenant broken at the Time when this Agreement was made; for he pleads, That it was made before any Cauſe of Action did ariſe for Breach of any Covenant; and Accord with Satisfaction is not a good Plea, but only in Diſcharge of Damages for a Covenant actually broken.

And for this purpose the Case of *Alden*, which the Serjeant mistakes for * *Eden* and *Blake*, was cited; where, in Covenant, the Breach was assigned *for not Repairing*; the Defendant pleaded an *Accord and Satisfaction*; and held good: But it was upon this Distinction, because in that Case no *certain Duty* was created by that Covenant on which the Breach was assigned; but the Wrong done in not Repairing, was to be recompenced by Damages, which may be discharged by *Accord, &c.* But 'tis otherwise where a certain Duty ariseth by the Deed it self, at the very Time 'tis executed; as where 'tis for Payment of Money, and the Breach assigned is for Non-payment, because this being a Duty created by the Deed it self, it shall not be discharged but by another Deed.

6 *Rep.* 43. *E.* 2 *Cro.* 99. *idem.*

There was another Case between *Rabbet*, which the Serjeant mistakes again for * *Roberts* and *Stoker*; 'tis reported by my Lord *Rolle* and Mr. Attorney *Palmer*, but very uncertainly by both, but I take it to be thus. *ff. B.* owed 100 l. to *A.* which he covenanted to repay within three Years; he covenanted likewise that *A. should enjoy a Lease of Lands peaceably for all that Time.* Notwithstanding this Covenant, *B.* entered several Times within the Term, for which the Action was brought, and the Breaches assigned accordingly.

* 2 *Roll. Rep.* 187. *Palm.* 110.

The Defendant pleads, That after the first, and before the other Entries, there was an Accord and Satisfaction in Discharge of the said Entries, but not of the Covenant; and it was held good, because Damages for the Entries were the Ground of this Action, which may be discharged without Deed.

Brittin versus *Vaux.* *Winford.* Trin. 12 Will. III.

Bucks ff. COVENANT against the Defendant as Assignee of one John Vaux, in which the Plaintiff declared, That in Consideration of 5 s. paid unto him by the said John Vaux, he bargained and sold a House, Garden and Rood of Land, to him the said John Vaux in Fee, who covenanted to keep the Ditches and Fences in Repair. The Breach was, That neither the said Vaux, in his Life-Time, nor the Defendant since his Death, (cujus assign ipse est) had kept the Fences in Repair.

The Defendant pleads, That he and the Assignees of John Vaux, had kept the Fences in Repair; and upon this they were at Issue, and the Plaintiff had a Verdict, but he could never get Judgment, because an Action of Covenant doth not lie against the Defendant as Assignee, for a Breach of that Covenant in the Life-time of the Assignor, and the Breach being assigned for a Default, as well in the Life-time of the Assignor, as by the Defendant after his decease, and entire Damages given, 'tis for that Reason naught.

Debt.

Brownlow Mil. &c. Executor' *Brownlow*, &c. verſus *Hewley* Mil.

DEBT for Rent, &c. wherein the Caſe was thus, ſi. Sir John Walter being poſſeſſed of a Park in Yorkſhire, for a certain Term of Years, aſſigned the ſame to W. L. rendering Rent on a certain Day; and afterwards granted the ſaid Rent to Richard Brownlow, to which Grant W. L. attorned.

Richard Brownlow made Sir John Brownlow his Executor, and died; and the Eſtate of W. L. by ſeveral Meſne Aſſignments, was veſted in the Defendant.

That Sir John Brownlow made the Plaintiff his Executor, and died, and that 550 l. was due for Rent; per quod actio accrevit.

The Defendant pleads in Bar, Quoad 50 l. that he was ready upon the Day in the Park to pay it, both before and after the Sun was ſet; and that neither the Plaintiff, or any Body in his behalf was there to receive it, and that it was never demanded ſince.

The Plaintiff demurred Specially, for that the Defendant had not alledged that he was ready to pay the Money, nec profert in Curia denar' ad ſolvend. &c.

The Plaintiff had Judgment, but we are to ſeek the Reaſon in the Caſes cited, which are jumbled together in a confuſed manner, but all that I can collect out of them is, That a * Tender of Money upon the Land is ſufficient, but then it muſt be pleaded to be made on the laſt Inſtant of the Day on which 'tis made payable: But this doth not concern this Plea, for the Defendant hath pleaded the Tender to be made on the laſt Inſtant of the Day, *viz.* both before and after the Sun was ſet.

* *Brooke Tender* 18. 2 *Cro.* 423.

But to come nearer to the Point, in *Brooke's Abr.* Title *tout Temps priſt* 25. there was an Aſſize for Rent; the Tenant pleaded that he was always ready, and yet is, and tendered his Money in Court.

But the Books ſeem to make ſome Difference as to this Matter, between an Action of Debt on a Bond, and an Action of Covenant; for

for if a Man is bound in an Obligation to pay a Sum of Money on a certain Day and Place, and an Action of Debt is brought on that Bond, there, upon a Tender and Refusal pleaded, the Defendant ought not to say, *profert hic in Curia denarios, &c.* because he is bound to tender the Money no where else, but at the very Place mentioned in the Bond. But if an Action of Covenant is brought on a Demise rendering Rent on a certain Day, there, if the Defendant plead he was all the Day on the Land ready to pay the Money, and no Body there to receive it, this was held a good Plea; but then the Precedents are, that he must likewise plead, That after the Day *hucusq; paratus fuit & adhuc existit ad solvend'* (to the Plaintiff) *denarios, ac illos* (to the Plaintiff) *paratos ad solvend'* (the Defendant) *hic in Curia profert, & hoc paratus est verificare, &c.* which being omitted by the Defendant in the principal Case, I suppose for that Reason the Plaintiff had Judgment.

Brooke Tender 6, 20.

Br. Tender. 11.

Aston 252.

Anonymus.

THE next is a Declaration without Name, Year, Term or Number-Roll, but 'tis signed by my Lord Chief Justice *Saunders*, whose Name may give it some Authority, because he was a Judge; and yet a Seat of Judicature doth not always imply a thorough Knowledge of the Law.

The Declaration was thus:

Shropshire ss. DEBT by an Infant per prochein Amy, setting forth, That T. was seized in Fee of the Manor of C. and being so seized, granted a Copyhold to F. and his Heirs, according to the Custom of the Manor.

That F. demised the said Copyhold to R. for Years, rendering 55 l. Rent per Annum, and died, and after his Death, the Reversion descended to his Brother, who surrendered part of the Premisses to O. P. and Elizabeth his Wife in Tail, Remainder to the right Heirs of the Husband.

That the Wife died, and the Husband survived, and was thereupon seized in his Demesne as of Fee, and did not say Fee-Tail.

Then he avers, That the Tenements so surrendered to him were worth 45 l. *per An.* according to the Proportion of the yearly Rent, reserved upon the Lease for the whole; and so the Action was brought for 22 l. 10 s. being for half a Year's Rent, juxta proportionem, &c.

There was no Plea to this Declaration, nor any farther Proceeding, but the Serjeant hath cited four Cases.

The first is in *Cro. Eliz.* 771. *ff.* The Father was seised in Fee of a Manor, which he held Part *in Capite* and Part *in Socage*; and he was likewise seized of a *Parsonage*, and let the whole to the Plaintiff for Years, rendering 77 *l.* 6 *s.* 8 *d.* Rent *per Annum*; then he

he *deviſed the Manor* to his eldeſt Son for Life, Remainder in Tail to his youngeſt Son. The elder Brother ſurrendered his Eſtate for Life to his younger Brother, who diſtrained, and in Replevin avowed for *five Parts of the Rent of the Manor into ſo to be divided*; and ſhewed that the Parſonage was worth 20 *l. per Annum*, but did not ſet forth of what yearly Rent the Manor was. And upon Demurrer the Objection was, That he did not ſhew the entire Value of the whole Demiſe; but it was adjudged, That there ſhall be an Apportionment of the Rent, becauſe the Diviſion of the Manor was made by Act of Law, *viz.* by the Statute of * *Wills*, which divides the Land into three Parts, and gives the Owner Power to deviſe two Parts thereof, but the other third Part as well *in Socage* as *in Capite*, muſt deſcend to the Heir to anſwer Wardſhips.

Br. Tenant. 11.

* 32 *H.* 8.

So that this is not like the principal Caſe in the Declaration, where the Diviſion was made by the Act of the Party, *viz.* by the Surrender.

Cro. Eliz. 851. In the ſame Book. *ſſ.* A Man ſeized in Fee of Lands held *in Capite*, made a Leaſe for Years, rendering 40 *l. per Annum* Rent; then he deviſed the ſaid Lands and died, his Heir being under Age; ſo that he being intitled to the third Part by the Statute of *Wills*, the Queen, whoſe Ward he was, granted the ſaid third Part, both of the Reverſion and the Rent, to the Plaintiff, during the Minority of the Ward, who brought an Action for three Years Rent; and it was held, That it might be apportioned, becauſe it was on a real Contract between the Queen and him; for if it had been in the Caſe of a common Perſon, and the Tenant had attorned to ſuch Grant, the Rent is apportionable; but where the Queen is a Party there needs no Attornment.

1 *Lev.* 40. There is a Caſe in *Levinz*, where a Copyholder in Fee made a Leaſe for Years rendering Rent, and then ſurrendered the Reverſion *of two Parts*, to the Plaintiff, who diſtrained for two Parts of the Rent; and held good without Attornment.

2 *Lev.* 231. And there is another in *Levinz*, where Leſſee of a Term, aſſigned a *Moiety of the Land*, *Habendum* during the Term; and the Leſſor brought Debt againſt the Aſſignee, for a *Moiety of the Rent*; and it was held, That the Aſſignee having an entire Eſtate in the *Moiety of the Land*, there was a ſufficient Privity between the Leſſor and him, to charge him with a Moiety of the Rent.

So that upon the Authority of theſe Caſes, this Declaration ſeems to be well drawn.

Anonymus

Anonymus.

BUT this next Declaration was drawn by Mr. Pronotary *Townsend*, and peruſed by Sir *William Jones*, both great Men in their Profeſſion, but great as they were our Serjeant tells us, the Declaration was faulty in his Opinion: Now one who oppoſes his ſingle Judgment againſt two ſuch Men, ſhould have more than an ordinary Aſſurance that he is in the right, but 'tis very plain that he is altogether in the wrong.

It was a *Shropſhire* Cauſe as well as the former, and without Term, Year or Number Roll. And it was alſo,

An Action of Debt brought by an Infant per prochein Amy, ſetting forth, That Sir Francis Lloyd, being ſeized of a Meſſuage, &c. demiſed it to H. (but did not ſhew for how long, or for what Rent) who by Vertue thereof entered; That Sir Francis afterwards by Leaſe and Releaſe, Relaxavit & confirmavit the Reverſion to Truſtees and their Heirs, to the Uſe of himſelf and the Heirs of his Body, upon the Body of M. his Wife, begotten, &c. and for want of ſuch Iſſue to the Plaintiff for Life; That Sir Francis Lloyd died ſeized of the Reverſion, ut præfertur, and without Iſſue, That after his Death the Plaintiff was ſeized of the Reverſion for Life, and that he gave Notice thereof to H. the Leſſee; that H. made his Will, and the Defendant Executrix; and for 80 l. for Rent due this Action was brought.

Now the Faults which the Serjeant finds in this Declaration, are,

1. That the Words relaxavit & confirmavit in the Declaration makes it double, and to prove this he cites * *Lamplugh* and *Shery's* Caſe in his own Book; but he is as unfortunate in that Citation, as in many other Books of greater Authority; for like a Criminal formerly amongſt the Plough-ſhares, he runs blindfold through them all: 'Tis true, the Words *relaxavit & confirmavit* were in that Declaration, and there was alſo one Word more which was not in this, *viz.* *remiſit*, *relaxavit & confirmavit*; and the ſame Objection was made, That the Declaration was double; and 'tis a wonder that the Serjeant ſhould ſo ſoon forget the Anſwer, *viz.* That where many Words have the ſame Signification they ſhall not be taken to be double.

* *Antea* 166.

2. That after he had ſet forth a Conveyance of the Reverſion to Truſtees, &c. by Leaſe and Releaſe, for the Uſe of Sir Francis, and the Heirs of his Body, &c. he alledges, That Sir Francis died ſeized of the Reverſion, ut præfertur; when 'tis not ſo much as mentioned before, that he had any Reverſion in him by Vertue of the ſaid Releaſe; but admitting it had, yet it might be a Queſtion, whether it had been good without adding theſe Words. ſ. That by Vertue of the ſaid Releaſe, necnon vigore ſtatut. de uſibus in poſſeſſionem transferend', he was ſeized, &c.

This Objection ſeems to be grounded upon *Snelling* and *Norton*'s Caſe, in *Cro. Eliz.* 407. but the Page is not only miſtaken, for 'tis 409, but the Caſe it ſelf; for the Serjeant tells us, That upon a Motion in Arreſt of Judgment, the Court held the Omiſſion of theſe Words to be a Fault in Subſtance, when there is not one Word in that Caſe like it.

Beſides, if it had been ſo in that Caſe, I cannot imagine why the Serjeant ſhould inſinuate that 'tis a Fault in this, when he tells us in the ſame Paragraph, That my Lord *Dyer* and *Hobart* were of a contrary Opinion; and not only ſo, but the whole Court in *Cro. Eliz.* 903. held, That this Statute was a general Law and need not be pleaded.

Dyer 85. *B.* *Hob.* 310.

But that which is very remarkable is, He hath objected one Thing more as a Fault in this Declaration, which he himſelf in the ſame Sentence allows to be none.

3. ſt. That 'tis alledged in the Declaration, that Notice was given, but 'tis not ſaid by or to whom, nor of what ſuch Notice was given; which by the By is a Miſtake, for 'tis ſaid, That *the Plaintiff* gave Notice to *H.* (who was the Leſſee) 'Tis true, he did not ſhew of what ſuch Notice was given, nor was there any Occaſion for it, for the Serjeant admits, that he ought not to alledge any Notice at all, becauſe the Eſtate is executed by the Statute of Uſes.

Ange verſus *Patterſon.*

Cooke. Hill. 35 & 36 Car. II. Rot. 1757.

London ſſ. DEBT on a Bond, &c.

The Defendant craved Oyer of the Bond and of the Condition, which was for Performance of Articles, by which it was agreed, That the Plaintiff ſhould ſell certain Goods to the Defendant, which were then in an Inn, called the Hand in Hand in Kingſton, &c. and that he ſhould aſſign his Term in the ſaid Inn to the Defendant; and amongſt other Articles it was agreed between the Parties, That the Plaintiff ſhould ſerve the ſaid Inn with ſtrong Beer and Ale, during the ſaid Term; ſo as he ſold as good of both Sorts as was uſually ſold to the Inn-keepers there; then he pleads Performance of all the Articles on his Part.

The Plaintiff replies, and amongſt other Things avers, That he was always ready to ſerve the Inn with Beer, and as good as was ſold to the Inn-keepers there, and aſſigns the Breach, That the Defendant had bought ſeveral Hogſheads of other Brewers, &c. and upon Demurrer to the Replication it was objected,

1. That the Plaintiff ought to ſhew that he had brought the Beer and Ale to the Inn; and that the Defendant had refuſed it.

But it was answered, This would not only be a great Inconvenience, by reason of the Bulk and Weight, but it would be impossible for the Plaintiff to know how much he should bring, unless the Defendant had acquainted him how much he needed.

'Tis like the Case where the Lessor covenants with the Lessee to find Timber for Repairs, the Tenant must give Notice what Quantity is necessary, otherwise the Lessor is not bound to deliver it. 1 Roll's Abr. 465.

There are some other Cases cited to prove this Matter which I have perused, and they are, *ff.* Where there is any Uncertainty, either of the Person, or of the Thing in Demand, or where it rests only in the Knowledge of the Plaintiff, there he must give *Notice* to enable himself to the Action. *Cro. Car.* 571. 2 *Cro.* 432. *Hob.* 51.

It doth not appear on the Roll, whether any Judgment was given in this Case or not.

Duppa & al' versus *Stephens.*

Cooke. Hill. 36 & 37 Car. II. Rot. 331. in C. B.

Midd. ff. DEBT brought by the Plaintiffs Servientes Domini Regis nunc, Anglice the King's Gentlemen Ushers, setting forth the Antiquity of their Office, and that an antient Fee of 5 l. belonged to them, from every Person that was voluntarily Knighted; that the Defendant, voluntarie and without Compulsion, gradum militarem suscepit, per quod actio accrevit (to the Plaintiffs) to have the said 5 l. which the Defendant had not paid.

The Defendant pleads in Bar, That he was Knighted *in* sola obedientia of the King's Command; and upon Demurrer it was held;

That a Fee might belong to this Office; and if so, an Action of Debt will lie to recover it.

The chief Objection was, That the Plea was not direct, but argumentative; for the Fee was claimed of the Defendant, because he was voluntarily Knighted; but the Plea was, That he was Knighted in sola obedientia Regis, which may be true, and yet voluntarily, because Obedience ex vi termini is a voluntary Act of the Will: And in this Case there could be no manner of Punishment if the Defendant had disobeyed, therefore he ought to have traversed, that he was Knighted voluntarily.

I cannot tell what the Serjeant means by saying, That where a Plea is directly contrary to the Matter alledged in the Declaration, that 'tis not good without a Traverse. I always took it, that in such Case there needs no Traverse, because there must be an Affirmative and Negative where the Matter is directly contrary, and that makes an Issue.

But the Case which he has cited to prove this Assertion doth not come up to it. *ff.* The Plaintiff alledged, That the Defendant *malitiose* *Cro. Eliz.* 285.

tieſe laid ſo much Weight on a Warehouſe, that *propter gravitatem ponderis* it fell down.

The Defendant pleaded, That *propter ruinoſitatem* it fell down: Now though this might be in ſome meaſure true, yet it was *not a direct* Anſwer to the Charge, that it was not directly contrary to the Matter alledged in the Declaration, and therefore a Traverſe was held neceſſary.

In 2 *Cro.* 657. there is not one Word to this purpoſe.

But then the Defendant's Counſel inſiſted, That ſola in this Caſe may imply a Negative, viz. That what he did was in ſola obedientia Regis, that is, he had not obeyed if the King had not commanded; and if ſo, there had been an Iſſue and no need of a Traverſe.

However, if the Plea was faulty the Declaration was ſo too; for the Plaintiffs had not ſet forth, that the Office was granted to them, neither were their Additions properly alledged, viz. Servientes Domini Regis, which may be Serjeants at Law, Serjeant Trumpeter or Serjeant Farrier.

But the Word *Serviens* doth not always ſignifie a Serjeant, and I think 'tis impoſſible it ſhould in this Caſe, becauſe the *Anglice* denotes what is meant by the Word, *viz.* a Gentleman Uſher.

Judgment was given againſt the Defendant for want of a Traverſe.

Mitchel verſus *Pope*.

Cooke. Mich. 1 Jac. II. Rot. 565.

Dorſet ſſ. DEBT upon a Bond for Performance of an Award.

The Defendant pleads no Award.

The Plaintiff replied, and ſhewed the Award for the Defendant to pay 250 l. to the Plaintiff in Right of his Wife, as a full Moiety or Share of the Eſtate of Henry Payne, her Father deceaſed, and that upon Payment thereof they ſhould ſeal general Releaſes; and aſſigns the Breach in Non-payment of the Money.

The Defendant rejoins, and amongſt other Things ſets forth, That a Difference happened between him and the Plaintiff, concerning All the perſonal Eſtate of Henry Payne, which they ſubmitted to Arbitrators, who did not make an Award de toto perſonali ſtatu of the ſaid Payne.

And upon Demurrer this was held to be a plain Departure from the Plea, becauſe the Defendant had pleaded no Award made; but in his Rejoinder he ſets forth, That it was not made de toto perſonali ſtatu, which is a Negative pregnant, and implies, that an Award was made, though not of all the perſonal Eſtate: I ſuppoſe the Serjeant means ſo when he ſays, it was confeſſed *per un fort implitat'*, or elſe I know not what he intends by thoſe Words.

And here to do him Juſtice, I cannot ſay that I believe he examined the Caſes cited, for they are proper and *ad idem*, which is ſo rare, that I cannot chuſe but mention it. *Keilw.* 75. 2 *Saund.* 489. *Sid.* 180.

2. The Rejoinder and the Award cannot both be true, for the one is, That the Award was not made of all the perſonal Eſtate of Henry Payne, and the Award is, That 250 l. was allotted to the Defendant, in full Satisfaction of his Moiety, which muſt be a Moiety of the whole perſonal Eſtate.

Elwes verſus *Vaughan.*

Belvin. Hill. 1 & 2 Jac. II. Rot. 381. in C. B.

London ſſ. DEBT upon Bond for the true Service of an Apprentice; and amongſt other Things the Condition of the Bond was, That he ſhould give an Accompt of his Maſter's Wares and Money, upon reaſonable Demand, and that if he imbezilled any of the ſaid Goods, That then the Obligor (who was the Defendant) was to make Satisfaction within three Months after Notice in Writing.

The Defendant pleads Performance.

The Plaintiff replied, That 1000 Pieces of Spaniſh Cloth, &c. came to the Hands of his Apprentice at Hamburgh, and that he was required to give an Accompt, and to diſcharge himſelf thereof, which he refuſed to do.

And upon Demurrer this Replication was held ill, becauſe 'tis not alledged who required the Apprentice to accompt, nor to whom it ſhou'd be given.

Beſides, 'tis ſaid, he was required to accompt, and refuſed, but did not ſay & adhuc recuſat.

This ſeems to be very nice, for it appearing by the Condition of the Bond, That the Apprentice was to accompt to his Maſter, and having pleaded, That he had accompted with him; and the Plaintiff replying, That ſuch of his Goods came to his Servant's Hands, it muſt be reaſonably intended that the Plaintiff, who was the Owner, required the Apprentice to accompt for them; and it cannot without a Strain be intended that it ſhould be given to any other Perſon whatſoever.

There was no Book cited in this Caſe.

Strong versus *Saunders.*

Belvin. Hill. 2 & 3 Jac. II. Rot. 1789.

Devon ss. DEBT upon Bond against the Defendant, as Executor of one Jacob Saunders; and it was upon a Bond for Non-performance of an Award.

The Defendant pleaded no Award made.

The Plaintiff replied and set forth the Award, reciting, That several Persons being indebted to one Joan Baker, she ordered the Testator Jacob Saunders, to take Bonds for the said Debts in his own Name, which Bonds she afterwards assigned to him and Elizabeth Strong; and that he received the Money due on the Bonds, a Moiety whereof belonged to the Plaintiff; and that she being indebted to the said Saunders in 15 l. the Arbitrators awarded, That he should pay unto her 29 l. 2 s. 10 d. super deliberationem arbitrii unto him: Then she avers, That the Award was delivered to the Testator, &c. and that the Money was not paid.

Upon Demurrer to this Replication the Exception was, That the Breach was assigned too narrow in respect of the Time of Payment of the Money, viz. upon the delivery of the Award; for that might be when the Defendant was on a Journey, or from Home, so that he ought to have a reasonable Time allowed to pay it; and therefore the Plaintiff should have said, That it was not paid upon the Delivery of the Award, nec unquam postea.

But this Exception was not allowed, for there was no Reason to presume that the Award was delivered on a Journey, or that the Money was paid after the Delivery, &c. for if any such Thing had been done, the Defendant should have pleaded it.

18 *Edw.* 4. | 21. *plac.* 31. The Year-Book 18 *Edw.* 4. was cited to prove this Breach was not well assigned; It was Debt upon Bond for Performance of an Award, which was, That the Defendant should seal and deliver a Bond to the Plaintiff *immediately* after the Award, *&c.* which he had not done; and it was held, That he ought to have a reasonable Time to do it, and therefore, that the Word *immediately* should be rejected.

So is *Roll's Abr.* Tit. *Condition*, 3 & 4. The Serjeant should have said *litera C.* or otherwise the Reader must do as I have done, that is, look through the whole Title before I could find it.

Browne verſus *Walker.*

Belvin. Hill. 2 & 3 Jac. II. Rot. 1919.

Rutland ſſ. DEBT upon Bond, &c. The Defendant craved Oyer, and it was for Performance of Covenants in a Leaſe of certain Mills and Lands in Caſterton, for three Years, under the yearly Rent of 27 l. 10 s. in which the Plaintiff covenanted to find Cogs, Rounds, Braſſes, Timber, &c. for the Mills during the Term, and the Defendant covenanted to keep them in Repair, and to pay the Taxes; then he pleads Performance.

The Plaintiff replied, That the Defendant ſuffered the Mills to decay; for that the Water-Wheel of the Fulling Mill, and the Cog-Wheel of the Corn-Mill were broken, and ſo decayed that the Mills could not be uſed.

The Defendant rejoins, That he demanded Timber, Coggs, Spindles, Braſſes, &c. of the Plaintiff, to repair the Mills, but that he refuſed to deliver any.

And upon Demurrer the Court was divided, Whether thoſe were conditional or reciprocal Covenants? And to prove the later there were ſeveral Caſes cited.

But the Serjeant begins very unluckily with the firſt Caſe, which is to ſhew where the Covenants are conditional, as for Inſtance; *ff.* Covenant to enfranchiſe a Copyhold, and the Owner, *in Conſideration of the ſame performed*, covenanted to pay Money for it; in this Caſe he is not bound to pay, *&c.* before the Copyhold is enfranchiſed. 3 *Leon.* 219.

The other Caſes are all concerning mutual Covenants. *ff.* G. and three others covenant with *P.* and others, to let a Ship to *Freight* to *P.* for the Uſe of *B.* and they covenant with *B.* That the Ship ſhall ſail to *Lynn*, and take Freight there, and ſo proceed in her Voyage; and *P.* covenanted with *G.* That *B.* ſhall load the Ship, and that he ſhall pay *pro tota transfretatione* ſo much Money: It was held, That *G.* and the other three Perſons might have an Action of Covenant againſt *P.* for Non-payment of the Money, without averring the Performance of the Covenants on their Parts. 1 *Roll's Abr.* 414. Lett. *T.* N°. 5, 416. N°. 15.

Thus 'tis reported by my Lord *Rolle*, but if the Serjeant had looked into 2 *Bulſtrode*, 168. he might have found that this Judgment was reverſed, becauſe there was ſomething to be done by the Plaintiff himſelf to intitle him to the Action, *viz.* Preparing the Ship and Freighting her, and then Tranſporting the Goods.

So where the Leſſor covenants to repair the Houſe before *Midſummer*, and the Leſſee covenants to keep it in Repair afterwards; the Leſſor brings an Action for not Repairing, and doth not aver that he put it in Repair before *Midſummer*; yet it was held good, becauſe the Repairing before *Midſummer* was not a Condition precedent, but the

the Covenants were mutual, and each might have mutual Remedies.

1 *Saund.* 319. 2 *Saund.* 350. So where there was an Agreement in Writing, That one ſhould pay the other 500 *l.* for all his Land, *&c.* In Witneſs whereof they put their Hands and Seals mutually to the Agreement: An Action of Debt was brought for the Money, without averring that he had conveyed the Land, or tendered a Conveyance, becauſe theſe were mutual Covenants, upon which each Party had a mutual Remedy.

Mutual Covenants are almoſt of the ſame Nature with mutual Promiſes, for there needs no Averment of Performance in either Caſe; but it was my Lord *Hale*'s Opinion, That where a Promiſe relates to an Agreement which contains a Condition precedent, the Performance of it muſt be averred: 'Tis true, the mutual Promiſe is the Foundation of the Conſideration, but that Promiſe muſt relate to the Agreement, and doth not oblige any otherwiſe than according to the Agreement it ſelf.

Kegg & Collington verſus *Horton.*

Winford. Mich. 3 Jac. II. Rot. 534

London ſſ. DEBT upon Bond, dated 10 January, 33 Car. 2. to ſave the Plaintiffs harmleſs, who were then Bail to an Action brought againſt George Loadsby, at the Suit of R. Wynn.

The Defendant pleads non damnificati.

The Plaintiffs reply, That in Michaelmas Term 33 Car. 2. Wynn proſecuted Loadsby in the Exchequer, in an Action on the Caſe, and that in Hillary Term 33 & 34 Car. 2. the Plaintiffs became Bail to the Action; and that in Trinity Term following, viz. 35 Car. 2. R. Wynn obtained Judgment in the Action, and that on the 20th of March, 35 Car. 2. he died inteſtate (which was before he got Judgment) that Adminiſtration of his Goods was granted by the Biſhop of Lincoln, to one William Goodhand, and that Loadsby had not paid the Money or rendered his Body in Diſcharge of the Bail, but that the Plaintiffs had paid the Money to the Adminiſtrator of Wynn.

And upon Demurrer to this Replication the Defendant had Judgment. 1. Becauſe it appeared by the Pleading, That Wynn died before he recovered againſt Loadsby, which is impoſſible.

2. Becauſe the Plaintiffs had alledged they paid the Money to the Adminiſtrator, when in truth he had no Authority to receive it; for the Adminiſtration granted by the Biſhop of Lincoln was void, becauſe the Judgment was obtained at Weſtminſter by the Inteſtate.

3. It appears by the Condition of the Bond that the Plaintiffs became Bail 10 January, 33 Car. 2. and 'tis set forth in the Replication that they were Bail in Hillary Term 33 & 34 Car. 2. which was after the Bond was dated.

The Mayor, &c. *of Cambridge* versus *Herring*.

Winford. Hill. 1 & 2 Jac. II. Rot. 1534.

Cambridge, ff. DEBT upon a By-Law, setting forth, That Cambridge was incorporated by Letters Patent of King James I. with Power to make By-Laws, and to impose Fines; that King Charles I. by Letters Patent likewise granted that one of the Burgesses of the said Town should be Mayor, and that there should be 12 Aldermen, and 24 Common-Council-Men; that the Mayor and the Majority of the Burgesses made a By-Law, viz. That if any Common-Council-Man should from thenceforth voluntarily resign his Office, he should pay 10 l. to the Ale of the Corporation; that the Defendant was appointed Common-Council-Man, and had voluntarily resigned his Office, per quod Actio accrevit.

Upon nil debet pleaded, the Plaintiff had a Verdict; and it was moved in Arrest of Judgment,

That the Resignation ought to be to the Mayor, and in Writing, because the Defendant had a Freehold in his Office; besides, he ought to have Notice of this By-Law, because it was made before he was a Common-Council-Man.

The Serjeant tells us, these Exceptions were over-ruled, but he doth not shew for what Reason; and therefore I will offer what occurs to me upon this Occasion.

And first as to the *Resignation*; it need not be made to the *Mayor*, because he doth nothing to confirm a Common-Council-Man in his Office, to which he is chosen by Majority of Votes: 'Tis true, where a Man can have no Title to the Profits of an Office, without the Admission or Confirmation of a Superiour, there the Resignation must be made to him; and 'tis for this Reason that the Resignation of a Benefice must be made to the Ordinary, because the Clerk hath not *jus ad rem* before Institution.

This is agreeable to that Rule in the Canon Law, *viz. Ei debet fieri renunciatio cui pertinere dignoscitur confirmatio:* But the Mayor cannot interpose either in the Admission or Confirmation of a Common-Council-Man in his Office, therefore the Resignation ought not to be made to him; and if not to be made to him at all, then not in Writing.

Neither is there any Occasion of giving the Party Notice of this By-Law, because such Laws are presumed to be made for the Government and common Benefit of Persons in particular Districts and

Limits, and therefore all those who live within such Jurisdictions are bound to take Notice of those Laws at their Peril.

Burbridge versus *Clayton.*

Cooke. Hill. 1 & 2 Jac. 2. Rot. 1075.

Nottingham, ss. DEBT by an Administrator de bonis non, brought by the Plaintiff in Right of his Wife, who was the Widow of Robert Clegg, against the Defendant, as Executrix of William Clayton, setting forth, That the Testator became bound to the said R. Clegg in 200 l. that the Money was not paid to him, nor to the Plaintiff who married his Widow, to whom Administration de bonis non was granted by the Steward of the Manor of Mansfield, cui commissio Administrationis illius de jure pertinuit: Then he sets forth that he was damnified, &c. et profert hic in Curia, &c.

The Defendant pleaded, That R. Clegg, both at the Time of his Death, and before, was resident at W. out of the Jurisdiction of the said Manor.

The Plaintiff replied the same Matter as in the Declaration, and the Defendant rejoined as in the Bar; and upon Demurrer it was objected,

That the Plaintiff had not set forth what Authority the Steward had to grant Administration, either by Grant or Prescription, or that he was loci illius ordinarius. 'Tis true, this might have been a good Objection, if it had been to a Plea; but it being to a Declaration, 'tis not so; because at the End of it, there is a profert hic in Curia Literas Administrationis, so that the Court may judge of the Authority in granting them; and therefore, in a Declaration 'tis sufficient to say, that illi de jure pertinuit.

Cro. Eliz. 431, 879, 838. 1 Lev. 193.

Besides, the Defendant had confessed the Jurisdiction of the Steward of the Manor, by pleading that Clegg lived out of it; so the Plaintiff had Judgment.

Terry versus *Wade.*

Cooke. Pas. 2 Jac. 2.

London, ss. DEBT upon Bond, by which Peter Wade of London was bound, conditioned that the said Peter Wade, on the 11th Day of March, &c. should pay to the Plaintiff Michael Terry 253 l. giving ten Days Notice at the House of *Peter Wade*, scituate in Lombard-street, London.

The

The Defendant pleads in Bar, That the Plaintiff did not give him Notice, &c. There was a Replication and Rejoinder, and upon Demurrer the Plaintiff had Judgment, which the Serjeant tells us was given for two Reasons; but I think he is mistaken in both.

The first Reason was, because Notice was to be given by the Defendant himself, and not by the Plaintiff.

Now this is not only contrary to the usual Course in all such Cases, but 'tis contrary to the Sense and Meaning of the Condition it self; for if the Defendant is to give Notice, then it must be given at his own House, which is an Absurdity not to be imagined; and therefore they would intend the House of *Wade* in *Lombard-street* (where, by the express Words of this Condition, the Notice was to be given) not to be the House of *Wade* of *London*, but of another Person, because 'tis not said at the House of the *above-bounden Peter Wade in Lombard-street*; but this is as absurd as the former, for 'tis contrary to the plain grammatical Construction of the Words, which stripp'd of this Disguise are thus: *ff. Peter Ward* of *London* was to pay to *Michael Terry* 253 l. on a certain Day, *giving* ten Days Notice at the House of *Peter Wade* in *Lombard-street*.

Now first as to the Notice, it must be given by the Plaintiff, because the Word *giving* (in the Condition) is a Relative, and *Michael Terry* is the next Antecedent.

Then as to the Place where this *Notice* was to be given, and that must be at the House of *Peter Wade*, who was bound to pay it; 'tis very foreign to intend it at any other Place; for Mens Acts ought to be expounded according to ordinary Custom and Usage: And 'tis generally known, that Creditors give their Debtors Notice to pay Money, but 'tis seldom or never heard that Debtors give the other Notice to receive it.

There was something intended by the Parties, when these Words were put into the Condition, and 'tis most reasonable to imagine that they were for the Benefit of the Defendant; for tho' he was to pay the Money on a certain Day, yet he did not know whether it would be then required, unless he had ten Days Notice given *to him*, and not *by him*, at his own House, before that Day.

2. The other Reason was, because it can never be intended that the Money was to be lost for want of Notice to pay it; therefore Judgment was given for the Plaintiff, because the Defendant ought to give Notice.

Now this is a plain Reason to me why Judgment should be given for the Defendant; for if Notice is requisite, there may be some Danger of losing the Money, for Default of Notice to be given by the Defendant; but it cannot so much as be thought that the Plaintiff will lose it for want of Notice given by him to the Defendant to pay it.

But admitting 'tis incumbent on the Plaintiff to give Notice, yet the Defendant's Plea is wrong, because it was pleaded in Bar, when it ought to be in Abatement; for that the Action was brought before the Money was due.

So

So is the Case between *Lawson* and *Witherington*; and because 'tis the same *in Terminis* with this, I shall mention it as 'tis reported, both by Justice *Raymond* and *Levinz*: *ff.* The Condition of the Bond was to pay 100 *l.* upon the 10th Day of *January*, *upon three Months Warning*; but in *Levinz* it was, *or upon* three Months Warning: Upon the first Argument the Court was of Opinion that the Plaintiff was to give the Notice, but Serjeant *Levinz* tells us, That it being moved again, they were of another Opinion, *viz.* That the *Obligor* was to pay the Money upon the 10th of *January*, and that he was to give the Plaintiff three Months Notice to receive it; and the Reason was, because the Words shall be taken in the strongest Sense against the Obligor.

Raym. 61. 1 *Lev.* 85.

Justice *Raymond*, who reports the same Case, doth not mention this Reason; but on the contrary tells us, that *Wyndham*'s Opinion was, That the Obligor was bound to pay it upon the 10th Day of *January*, after three Months Warning given by the Obligee; and this seems to be most agreeable to Law, as delivered by Justice *Gawdy*, *Anno* 37 *Eliz. viz.* That the Words in a Condition are so far from being taken in the strongest Sense *against the Obligor*, that they are always expounded *for him*, because the Condition it self is always made for his Benefit; so that the Reason given for that Judgment is very insufficient

Cro. Eliz. 396.

Cresser versus *Hunt.*

Pas. 1 Jac. 2.

London, ff. DEBT against the Defendant for an Escape. There is no Plea or Judgment, but only a Declaration for an Escape, which is very common; and I cannot find any Thing in it worth the Noting, unless 'tis that the Defendant was Constable of *Chester* Castle, which, Time out of Mind, hath been the Prison of that County.

Tunstall & Ux. versus *Williamson.*

Tempest. Hill. 3 & 4 Jac. II.

London, ff. DEBT upon Bond, reciting, That upon a former Grant made to the Defendant of the Office of Controller of the Customs of New-Castle upon Tyne, he became bound to secure the Payment of 50 l. per An. to the Plaintiff Katherine whilst sole, during the Joint-Lives of her and the Defendant; that the said Grant afterwards became void upon the Demise of the

King, that the Defendant petitioned the Lord Treasurer for a new Grant of the said Office, who appointed that the said Annuity should be paid to Katherine; and the Defendant gave a Note under his Hand, by which he promised, that as soon as the new Grant was sealed, he would execute a new Bond to the said Katherine for the Payment of the said Annuity; and he bound himself, in the Penalty of 300l. to perform the same: That a new Grant was made to the Defendant, but that he had not sealed a Bond to Katherine whilst sole, nor to the Plaintiff and Katherine after their Marriage.

Upon Demurrer to this Declaration it was held ill; for tho' the Defendant had not sealed a Bond to the Husband and Wife jointly after Marriage, yet he might have sealed a Bond to her alone; and therefore he should have said, that he had not sealed a Bond to her after Marriage.

There are no Books cited in this Case, and therefore I shall only take Notice that the Plaintiff was a Barrister at Law, but had the greatest Part of his Education in the Six-Clerks-Office, and therefore might be more apprehensive of the Equity of his Cause; which was, That the Money ought to be paid; then of the Means of recovering it by the Forms and Niceties in Pleading.

Graves versus *Hatchet.*

Cooke. Pas. 3 Jac. II. Rot. 423.

London, ss. DEBT by an Executrix of one Jacob Graves; the Defendant pleads, That after the making the Bond, the said Graves and the rest of his Creditors did, by a certain Writing, &c. covenant with him, that if he would pay 15l. every Monday Morning to certain Trustees, appointed by the said Creditors to receive it, until their several Debts should be satisfied, that in such Case, they nor either of them would trouble the Defendant; and this was under the Penalty of losing the Residue of their respective Debts; and that also in such Case that Writing should be a sufficient Bar and Discharge to any Action in such Court where the said Defendant should happen to be sued; and then avers that he paid the 15l. according to the Agreement; and so pleads the Writing in Bar to the Action.

The Plaintiff replied, That he had no Notice of the Writing; and upon Demurrer, I do not find there was any Thing further done in this Case by the Counsel in Court.

But now as to the digressive Part of it, our Serjeant bids us look into *Moor pl.* 573. and 2 *Saund.* 48. in which Cases the Question was, Whether a Defeazance ought to be made *at the same Time* with the Bond, and not *after*, as it was in the principal Case?

Moor tells us, That a Parol Defeazance, made *after the Bond*, was naught; but the Court admitted that such a Defeazance might be good, if in Writing.

But in 2 *Saund.* the Defeazance was in Writing, and yet not held good: The Case was thus, *ff.* Debt upon Bond; the Defendant pleaded, That *after the making the Bond*, the Plaintiff by his Defeazance promised, that if before such a Day he did not produce Witnesses to prove that it was a true Debt, and that the Defendant promised to pay the Money, that then the Bond should be void; and then avers, that he did not produce any Witnesses: The Book tells us, Judgment was given for the Plaintiff, because the Defeazance was alledged to be made *after the Bond*, when it ought to be made at the same Time, otherwise it shall not discharge it; but the Reporter tells us further, that this Judgment was given *minus consulte*, and he adds a good Reason for it, because Justice *Twisden* pronounced it *in furore*; for a Defeazance to a Bond is no more than a conditional Release, which is executory in its Nature; 'tis not like a Condition upon a Feoffment, where the Estate is executed; that is, as soon as the Deed is sealed, 'tis vested in the Feoffee; for in such Case, the Condition must be made at the same Time with the Deed, or be contained in it, otherwise 'tis void; but 'tis the Nature of a Bond to be executory, for it may be released at any Time; and therefore there is no Necessity that a Defeazance should be made at the very same Time the Bond is sealed.

Parkes versus *Middleton.*

Trin. 4 Jac. 2.

Lincoln, ff. DEBT upon Bond; the Defendant craved Oyer of the Condition, which was, That if he paid the Plaintiff's Attorney all the Costs and Charges of a Suit between them, which the said Attorney should charge, and discharged the Plaintiff thereof, then the Bond was to be void; then he pleads, That he paid the Attorney all the Costs of Suit which he had charged the Plaintiff withal.

The Plaintiff replied, That the Attorney did charge him with 4 l. 16 s. which the Defendant had not paid, nor discharged him thereof.

The Defendant rejoins, That the Attorney had not given him any Bill of Costs under his hand, as injoined by the Statute; and upon Demurrer, the Court held the Plea in Bar to be too general,

Because the Defendant ought not to have said that he paid all the Costs of Suit, but he should have shewed that the Attorney had charged so much and no more, and that he had paid it; and such a Plea would have made the Matter certain, but very short.

This ſeems to be an Extraordinary in Pleading, and I have Reaſon to believe that this Objection was invented by my Lord *Coke*; for all the old Books tell us, that where a Condition of a Bond is to do ſeveral Things, *viz.* To accompt, pay, diſcharge, *&c.* 'tis ſufficient to plead in the Affirmative, as the very Words of the Condition are, *viz.* That he accompted, paid, diſcharged, *&c.* and this was to avoid Prolixity in Pleading: Now if that is a good Reaſon, then if the Condition of a Bond requires but one Thing to be done, I am ſure 'tis a ſhorter Way to plead that the Thing is done, than to ſhew the Time, the Place, and the Manner of doing it, which my Lord *Coke* tells us we muſt do; tho' at the ſame Time he admits it may be a good Plea to purſue the Words of the Condition, and ſhew Performance.

Cro. Eliz. 253, 749. 1 *Roll. Rep.* 382. 2 *Cro.* 359. *Latch*, 16. 9 *Ed.* 4. 14, 15. 16 *H.* 7. 4 *a.* 4 *H.* 7. 12.

The Serjeant has cited the Year-Books in the Margent, but I cannot tell for what Purpoſe; for I have looked into all thoſe Books, and can find nothing relating to this Matter.

There was an Objection made to the Replication that it was double, by alledging, That the Defendant had not paid the Charges, nor diſcharged the Plaintiff thereof.

But the Objection was diſallowed by three Judges, becauſe Payment of the Money had been a certain Diſcharge by the very Intent and Meaning of the Condition, which not being paid, the other was not diſcharged; but if it had been double, the Defendant could not take Advantage of it without demurring, but inſtead of that he had rejoined and departed from his Bar; for his Plea was, That he had paid all the Charges, and yet his Rejoinder was an Excuſe for not paying it, viz. becauſe the Attorney had not delivered his Bill, and ſo was the Opinion of the whole Court as to this Matter; tho' one of the Judges doubted whether the Breach was not aſſigned a little too general, viz. That the Defendant had not paid the Charges, nor diſcharged the Plaintiff thereof; but by the Opinion of the reſt, the Plaintiff had Judgment.

Roſſell verſus *Roſſell.*

Belvin. Mich. 3 Jac. II. Rot. 646.

Nottingham, ſſ. DEBT upon Bond brought againſt an Executrix, wherein her Teſtator was bound in nongint' & octogeſimis libris; and the Action was brought for 980 l.

The Defendant pleaded a Variance between the Declaration and the Bond, becauſe the one was for 980 l. and the Words in the Bond were nongint' & octogeſimis libris, which (if any Thing,) ſignified ninety and eightieth Pounds.

The Plaintiff in his Replication inſiſted that the Condition of the Bond might be recorded; which was, That the Teſtator was to pay 490 l. with Intereſt, on a certain Day; and then demurred, and had Judgment.

There

There are many Cases jumbled together, some of which are against this Judgment, and some for it; and most of them are in 2 *Rol. Abr.* 146, 147.

The first is N°. 6. Where a Man was bound in *viginti liveris*, instead of *Libris*, and that was held ill; so in N°. 11. *Sexgintis* for *Sexcentis*, and that likewise was held ill, because *Sexgintis* is no *Latin* Word, nor *Sexgint'*; but where 'tis *Sexigint'* for *Sexagint'*, or *Sexingent'* for *Sexcent'*; this is good, because those are *Latin* Words.

2 *Bulst.* 241.

There are many more Cases where insensible Words do not vitiate the Bond: As,

* *Octogesimo*,		*Octoginta*,
Octigenta,		*Octogenta*,
Septumginta,	for	*Septingenta*,
Wiginti,		*Viginti*,
Quinqgint,		*Quinquaginta*,
Trigintat,		*Triginta.*

* *Mod.* which is mistaken for *More*, 864.

But then in all these Cases the Condition must be to pay Money, for by that the Intent of the Sum in the Bond may be more easily known and explained.

Lovelace versus *Bickham.*

Winford. Trin. 2 Jac. 2. Rot. 1870.

Kent. ff. DEBT on Bond conditioned to save the Plaintiff harmless from all Actions, Suits, Costs and Charges, which may arise from certain Mariners, for or by Reason of their Tickets for Wages, which were deliver'd by the Plaintiff to the Defendant, &c.

The Defendant pleads, That he had saved harmless præd' Henricum Lovelace, when in Truth his Name was Christopher Lovelace.

The Plaintiff replied, That he was arrested by Process out of the Court of King's-Bench (but doth not say where that Court was then held) at the Suit of J. Barnes, who was one of the Mariners, in order to recover what was due to him on the said Tickets, and that he gave Bail to the Action, &c.

The Defendant rejoins, That the Plaintiff caused himself falsly to be arrested without the Consent of the said Barnes, and traversed that he was arrested aliter vel alio modo; and upon Demurrer,

It was excepted to the Bar, for that the Defendant had pleaded he had saved the Plaintiff harmless, but did not shew how; which was therefore too general.

And

And to prove this, the Serjeant mentions ſome Caſes which were cited as Authorities in Point, *viz.* That a Man may not plead in the Affirmative that he ſaved another harmleſs, without ſhewing *how*.

Now one of theſe Caſes is in the Year-Book 5 *Ed.* 4. which is juſt the contrary: It was Debt on a Bond conditioned to *diſcharge* a Sheriff, *&c.* The Defendant pleaded, That he had *diſcharged* him, but did not ſhew *how*; and yet it was held good, becauſe it was impoſſible to ſhew how, and in what Manner he had diſcharged him, unleſs the Plaintiff had ſhewed how he was charged. 5 *Ed.* 4. 8.

But the Diſtinction which is made in the Books is thus: *ſſ.* That where a Defendant pleads in the Negative, *viz.* *Non damnificatus*, 'tis good, without ſhewing how, or by what Means; but where he pleads in the Affirmative that he hath ſaved the Plaintiff harmleſs, there he muſt ſhew *how*, becauſe the Court may judge thereof. *Cro. Eliz.* 253. 2 *Cro.* 363. 1 *Leon.* 71. contra. 2 *Rep.* 4.

Beſides, If the Plea in the principal Caſe had been ill, for want of ſhewing *how* the Defendant ſaved the Plaintiff harmleſs, he could not have taken any Advantage of it without demurring ſpecially, and ſhewing this for Cauſe: But after a Replication to the Plea, the Plaintiff comes too late to make this Objection. 1 *Lev.* 194.

2. It was objected, That the Defendant had miſtaken the Plaintiff's Name, viz. in pleading that he had ſaved harmleſs præd' Henricum Lovelace, when his Name was Chriſtopher; this was eaſily anſwer'd, viz. That the Words præd' Henricum were Surpluſage and void, becauſe there was not any ſuch Perſon named before: And then if the Word Henricum is rejected, the Plea will be, that the Defendant indemnified præd' Lovelace; which is well enough.

However, If the Plea is good, the Rejoinder was adjudged to be bad, becauſe it was a Departure from the Plea: viz. The Defendant pleaded, That he kept the Plaintiff harmleſs; and by the Rejoinder he admits he was arreſted, (and ſo by Conſequence was damnified) but that it was by his own Procurement, and not by the Conſent of Barnes.

Now the Reaſon of this Judgment doth not ſeem ſatisfactory, becauſe the Covenants and Agreements of Men ought to be expounded according to common and ordinary Intendments, and not by any forced Inferences or Violence put upon the Words; and if ſo, no Man can think that when I covenant to ſave another harmleſs from all *Actions* which ſhall be proſecuted againſt him, that I ever intended *an Action* which he falſly procured to be brought on himſelf; for then a Man cannot poſſibly be ſafe who enters into ſuch a Covenant, becauſe the Covenantee will be damnified whenever he gets himſelf arreſted at the Suit of any Perſon againſt his Conſent, and without any Cauſe of Action.

Young versus *Johnson.*

Belvin. Hill. 2 & 3 Jac. II. Rot. 1918.

Lincoln, ff. DEBT against an Administratrix upon a Bond of 300 l. entered into by her Intestate.

The Defendant pleaded in Bar, That the Intestate the 2d of July 22 Car. 2. entered into a Recognizance to one Elizabeth Oldfield for 600 l. in the Nature of a Statute-Staple, debito modo capta before Sir John Vaughan, Lord Chief Justice of the Common-Pleas, &c. and that it was for a just Debt, not paid or satisfied; and so pleads that she fully administred, except Goods to the Value of 12 d. and that she had not Assets ultra.

The Plaintiff replied, That a Capias issued to take the Body of the Intestate, and that the Sheriff returned he was dead, and thereupon an Extent was sued out against his Lands; and upon an Inquisition taken, the Sheriff returned, that the Intestate was seised of several Houses and Lands, which were found to be of the yearly Value of 49 l. 19. and thereupon the 6th of September, 2 Jac. 2. there was a Liberate to deliver the said Lands to the Cognizee; and the Sheriff returned that he had delivered them accordingly on the 20th Day of the same Month, and that the Cognizee, Elizabeth Oldfield, was seized thereof until her Debt should be satisfied: and upon Demurrer to this Replication, some Exceptions were first taken to the Bar.

1. As to the Form of it, viz. It was said that the Recognizance was debito modo capta, but did not shew how.

But this was certainly a very frivolous Exception, because 'tis pleaded, That it was taken before the Lord Chief Justice, according to the Form of the Statute.

2. It was not alledged, That the Recognizance was enrolled, which is expressly required by the * Statute, and that to be within six Months after 'tis acknowledged, or otherwise it is void; but this must be understood as to Purchasers, and not against Creditors.

* 27 Eliz. cap. 4.

Then it was objected, That it doth not appear upon this Pleading but that the Debt may be satisfied.

But he that made this Objection, did never read the Replication; because 'tis said that the Debt was not satisfied by the Cognizor, or the Defendant; and it was impossible that it should be satisfied by the Extent, because the Debt was 300 l. and the Liberate issued out Anno 2 Jac. which was in the same Year this Matter was pleaded; and the Land extended was but 49 l. 19 s. by the Year, which could never satisfy a Debt of 300 l. in one Year.

The Serjeant tells us, That the Plaintiff had Judgment; but he doth not say for what Reason; we are to search for it in the Books which he has cited, and there we may find the Law to be, *viz.*

Where

Where Lands are delivered in Extent, 'tis a full Satisfaction of the Debt for which they are extended; and 'tis as if the Cognizee had taken a Leaſe thereof for Years, until the Debt is paid; and for that Reaſon he ſhall never afterwards take out a new Execution; ſo that the Adminiſtratrix cannot be charged by Vertue of this Recognizance, becauſe by the Acceptance of the Lands upon the *Liberate*, the Law preſumes that the Debt is ſatisfied, and that it remains no longer as a Charge upon the Eſtate of the Inteſtate.

2 *Cro.* 338. *Sid.* 356. 3 *Lev.* 269. *and not* 216.

There was another Objection to the Plea, viz. That the Defendant alledged, The Statute remained unſatisfied, but did not ſay where; but this is ſo impertinent that I ſcarce think it worth the mentioning; as if a Debt unſatisfied is not ſo every where.

Watts & al' verſus *Pitt* & al'.

Belvin. Mich. 1 Jac. II. Rot. 354.

Worceſter ſſ. DEBT for 200 l. upon Articles of Agreement, reciting, That Watts the Son was to marry the Daughter of Pitt, and in Conſideration of the Payment of 100 l. by Pitt the Father or his Son, to Watts the Father or his Son, it was articled, That Watts, the Father and his Son, ſhould convey to the intended Wife, and to the Heirs of her Body begotten by Tho. Watts, 20 l. per Annum in Jointure; and that old Watts and his Wife ſhould ſet over all their Stock of Cattle and Crop of Corn, unto young Watts and his Aſſigns; and for the due Performance of all the Agreements, &c. we bind our ſelves, (but did not ſay to whom) our Heirs, &c. in 200 l. to be forfeited upon due Proof of any Part of theſe Articles of either Side; but did not ſay upon due Proof of the Breach of the Articles.

And upon Demurrer it was objected, 1. That an Action would not lie upon ſuch inſenſible Articles; but the Court was of another Opinion, becauſe the Covenants were mutual, viz. for one to pay the Money, and for the other to ſettle a Jointure; and it ſhall be intended, That the Parties who were capable to oblige themſelves, have done it accordingly; and that in the Penalty of 200 l. to perform their mutual Agreements, which is to be forfeited upon Breach on either Side: So that though the Articles are ſenſeleſs, yet they ſhall be conſtrued according to the Intent of the Parties to ſupport the Deed.

3 Lev. 21.

2. It was objected, That there ought to be ſome collateral Proof of a Breach of theſe Articles; but it was held, That the Proof might be in the very Action now brought.

For the better underſtanding this Matter, I find this Diſtinction made in our Books, *viz.* Where a Man is bound *to prove* any Thing generally, without referring to Time, Place or Perſon, there it ought to be by what my Lord *Coke* calls the principal Proof in Law;

and that is by a Jury in the ſame Suit; but where the Parties by any Agreement amongſt themſelves, allow of another Form of Proof, that ſhall prevail againſt the legal Conſtruction of the Word.

2 *Cro.* 381, 188. As for inſtance, the Condition of a Bond was, That if an Apprentice waſted his Maſter's Goods, then if his Father within three Months after *due Proof* made thereof, either by the Confeſſion of the Apprentice or otherwiſe, ſhould make Satisfaction, *&c.* the Bond was to be void.

It was objected in that Caſe, That the Proof ought to be by Action brought, and Trial at Law, which is the moſt abſolute and notorious Proof; or if by his own Confeſſion, it ought to be likewiſe upon an Action; becauſe the Law regards no Proof but by a Trial by Jury, nor any Confeſſion but what is on Record: But it was adjudged, That where the Intention of the Parties appears by plain and obvious Circumſtances in Writing, that the Proof ſhould be in any other manner; in ſuch Caſe, it ſhall not be by a Trial; as if a Man is bound to prove a Thing in two Days before *R. N.* this cannot be by Trial, becauſe it cannot be had in ſo ſhort a Time; neither muſt it be before one of the Judges, becauſe 'tis agreed to be before another Perſon.

Smith & al' verſus *Boughton.*

Winford. Trin. 4 Jac II. Rot. 1663.

Warwick ff. DEBT againſt an Heir upon a Bond of his Anceſtor: The Defendant pleaded, That his Father was ſeiz'd in Fee of ſeveral Lands, which he mentions, and being ſo ſeiz'd, made a Leaſe thereof to one Mead for 500 Years, under the yearly Rent of a Pepper-Corn; and that he had not Aſſets by Deſcent præter reverſionem of the ſaid Lands; and upon a Special Demurrer theſe Cauſes were ſhewed againſt this Plea.

1. That the Defendant had not confeſſed or denied the Debt, as he ought, for the Precedents are ſo.

But he doth not mention where theſe Precedents are to be found: 'Tis true, in *Dyer* 373. *B.* there was Debt brought againſt an Heir, and he confeſſed the Declaration by *nil dicit*; ſo in *Aſhton's Entries*, 262. the Plea is thus, *viz.* That the Defendant *non poteſt dedicere actionem* of the Plaintiff, *nec quin ſcriptum obligatorium hic in Cur' prolat. eſt factum* (of his Anceſtor) *nec quin ipſe eſt filius & hæres, &c.* which is a Confeſſion of the Debt; but I cannot ſee any Neceſſity of a poſitive Confeſſion, becauſe what is not denied muſt be admitted.

Thompſon's Entries, 159.

2. It did not appear that the Leſſee had accepted the Leaſe by his Entry, for till that is done, there is no Reverſion; and if ſo, the Fee muſt deſcend to the Defendant.

But it was anſwered, That the Leſſee might enter at any Time; beſides, it being expreſly alledged, That the Defendant had nothing

beſides the Reverſion, 'tis a ſtrong Implication, That there was a Leaſe in Being and an Entry made, for otherwiſe there could be no Reverſion.

He tells us, He doth not know what became of the Cauſe, but ſeems to incline that the Plea was good, though it doth not agree with the Precedents abovementioned.

Bell verſus *Bolton.*

Belvin. Mich. 3 Jac. II. Rot. 731.

Worceſter ſſ. DEBT by an Attorney againſt an Adminiſtrator, upon a penal Bill of the Inteſtate, for the Payment of 33 l. on the firſt Day of November; for Payment whereof he bound himſelf in 60 l. and the Plaintiff averred, That the Defendant had not paid præd' ſexaginta libras on the firſt Day of November, &c.

The Defendant pleads in Bar, ſeveral Judgments obtained againſt him as Adminiſtrator upon Bonds of the ſaid Inteſtate, amounting to 75 l. and that he had fully adminiſtred præterquam 10 l. which was not ſufficient to diſcharge the ſaid Judgments.

The Plaintiff replied and confeſſed the Bonds; but that at the Time of the Judgments obtained, there was but 48 l. 10 s. due on the ſaid Bonds, and ſhews to whom, and that it was more than was really due for all the Debt and Damages on the ſaid Judgments, and that it would be accepted in full Diſcharge thereof, and that he had Aſſets ultra the ſaid 48 l. 10 s. to ſatisfie the Plaintiff's Debt: There was a Demurrer to this Replication.

There is nothing in this Caſe, but a Trial of Skill between the Counſel on both Sides, to find Faults in the Pleading: 'Tis true, the Court held the Replication to be ill; if ſo, the Judgment would have been for the Defendant, and yet we are told, *Curia adviſare vult.*

Now the Reaſon why the Replication was ill, was, Becauſe there was not any Thing put in Iſſue; for the Allegation that 48 l. 10 s. would be accepted in Satisfaction of the Judgments is not iſſuable; 'tis no more than Matter which might be given in Evidence of the Fraud: The Plaintiff ſhould have replied, That the Creditors would have accepted leſs than their juſt Debts, and that the Defendant would not pay it, but kept the Judgments on foot to deceive him. 3 Lev. 311, 368.

The Plaintiff's Counſel perceiving this to be material, had no way left but to find Fault with the Bar, and as to that it was objected, that it was ill.

1. Becauſe the Defendant had pleaded ſeveral Judgments without alledging that they were not ſatisfied: And the Court ſeemed to be of Opinion, that this was a good Exception.

But the Serjeant puts a *Quere* to this Opinion; for (says he) as a Judgment shall always be intended to be obtained for a just Debt, so it shall be presumed to continue a true Debt until the contrary appears. *Quere*, Whether the Serjeant is not mistaken in this, for I think he should have said *until 'tis satisfied*, because it may be a true Debt, and yet not satisfied?

Winch. Ent. 266. He hath cited some Books of *Entries*, wherein he tells us, That Judgments have been pleaded by Administrators, without averring they were not satisfied: 'Tis true, 'tis so in *Winch*, but in *Thomps.* 149. which he has likewise cited, 'tis otherwise; for there 'tis said, That *judicium præd' minime satisfact' remanet.*

He bids us look into *Hardres* 75. *& nota per totum*, which I have done; 'tis a very long Case, but that which is to this purpose followeth, *viz.* Upon an Inquisition on an Outlawry, the Party in 1654. pleaded, That he had obtained *Judgment* against the Person outlawed on the 12th of *November*, 1652. for 605 *l.* and that he had extended a Moiety of his Lands upon an *Elegit*: (which was but 10 *l. per Annum*) An Exception was taken to this Plea, because he did not aver the Judgment *was not satisfied*: 'Tis true, it was held in that Case, That there was not any Occasion for such an Averment, because it was not only absurd and incongruous to aver a Negative, but because it appeared on the Record it self, that it was impossible a Debt of 605 *l.* should be satisfied by the Perception of two Years Profits on an Extent of Lands of 10 *l. per Annum*; so that all which can be collected from this Case is, That 'tis an absurd Thing to aver a Negative.

And now the Case being a little altered, the Defendant's Counsel took an Exception to the Declaration, viz. The Plaintiff declared, That the Defendant had not paid præd' sexaginta libras upon the Day, &c. when it should be præd' 33 l. because there was no such Sum as sixty Pounds to be paid on the first Day of November, or on any Day; it was 33 l. to be paid on that Day, and the 60 l. was only a Penalty to enforce the Payment of it, and which was to be forfeited if the 33 l. was not then paid.

I do not find the Court took any Notice of this Exception, but the Serjeant being full of his *Queries*, made another to this Paragraph, which was, Whether the Word sexaginta shall not be taken to be void, and then it will be, that the Defendant had not paid the aforesaid Pounds, which he ought to pay, &c? Now admitting the Word *Sexaginta* to be *ex abundanti*, yet if 'tis rejected, there is a sufficient Certainty of the not paying the 33 *l.* For the Plaintiff declared upon a Bill penal for 33 *l.* payable on the first Day of *November*, and averred, That the Defendant had not paid *præd' sexaginta libras*; Now because the Word *sexaginta* is not named before by way of Payment, it shall be taken to be Surplusage, and then the Declaration is, That the Defendant had not paid *prædict' libras* which must be the 33 *l.* mentioned before.

Cro. Eliz. 697. *Palm.* 74. *Savile* 71.

And this was the Occasion of starting another *Quære*. If. Whether the Plaintiff should have Judgment if his Declaration was good, and his Replication naught? Which to me seems no Question at

all, for the Plaintiff cannot have Judgment if his Replication is ill; tho' *Butterfield* and *Marshal*'s Case is no manner of Proof of this Matter, and yet 'tis cited by the Serjeant for that purpose: 'Tis true, the Replication in that Case was held to be ill, and the Bar to be good, but nothing was said of the Declaration; and because the Replication was naught (though the Bar had been ill,) the Plaintiff could not have Judgment. *Folio* 603.

Slaughter versus *Peirpoint*.

Winford. Trin. 4 Jac. II.

Lincoln ff. DEBT for 150 l. brought against the Defendant as Administratrix of the Goods of the Marquess of Dorchester, upon a Bill signed by the said Marquess to a Goldsmith; The Plaintiff sets forth, That the Goldsmith was indebted to several Creditors in 600 l. and became a Bankrupt; that 19 Decembris, Anno 30 Car. 2. a Commission of Bankrupcy was taken out against him, and that seven Years afterwards upon the Death of the King, the Commission was renewed, viz. 10 Dec. 1 Jac. 2. at the Petition of some other Creditors; (but did not say how much he was indebted to them) that the Commissioners 2 Nov. Anno 2 Jac. II. assigned the Bill to the Plaintiff, who averred, That the Money was not paid, unde actio accrevit.

1. Upon Demurrer it was objected to the Declaration, That it doth not appear that the Commissioners had acted in Pursuance of their Commission, before they assigned the Bankrupt's Debt to the Plaintiff, for they had not so much as adjudged him a Bankrupt.

But it was answered, That it shall be presumed they acted regularly till the contrary appears, and that 'tis not necessary that the Commissioners should adjudge him a Bankrupt, because the Defendant cannot traverse it; besides, 'tis positively averred, That he became a Bankrupt on such a Day, and that is traversable.

2. 'Tis not said that the Bankrupt owed 100 l. at the Time of the renewing the Commission: Now the Statute 21 Jac. 1. cap. 1. requires, That a Person must owe so much and more, before he can be a Bankrupt.

But this Exception was not allowed, for it was held to be only a farther Description of a Bankrupt.

3. It is not alledged, That the Creditors who took out the first Commission, were not paid before the Commission was renewed; and there being seven Years between the two Commissions, it may be reasonably presumed they were in all that Time discharged; if so, then there was no Creditor, and if no Creditor there can be no Bankrupt, because the Commission is to be granted upon the Petition of a Creditor.

But

But it was answered, That 'tis not absolutely necessary it should be granted upon the Petition of a Creditor, for by the Statute of
13 Eliz. c. 7. 13 Eliz. it may be granted upon a Complaint of any one in Writing, made against a Bankrupt.

4. The chief Objection was, That Notice ought to be given to the Defendant, that the Commissioners had assigned this Debt to the Plaintiff; and the rather, because the Defendant might have confessed the Action, and so had saved the Costs, &c. and for this
2 *Cro.* 456. purpose Hemesley's Case was cited, which is mistaken for *Henning's*
1 *Rol. Rep.* 285. Case, and 'tis the same as reported by my Lord *Rolle*, by the Name of *Paul versus Hemmings*; It was an Action on the Case, on a Promise to pay for two Weighs of Barley, as much as the Plaintiff should have of any other, abating a Penny *per* Bushel; and the Plaintiff declared, That he had sold to *S. two Weighs*, *&c.* which abating as aforesaid, amounted to 17 *l.* 10 *s.* but did not set forth that he gave *Notice* to the Defendant, that S. had given so much for the Barley, and for this reason the Defendant had Judgment; because *S.* was a meer Stranger, and not mentioned in the Agreement between the
Aleyn 24. Parties; for if that had been done, then Notice is not necessary, *quia constat de persona.*

But the Court held in the principal Case, That Notice was not necessary, because by the Assignment of the Commissioners, the Property of the Debt was vested in the Assignee, by Vertue of the Statute 1 Jac. cap. 15. as if the Bill had been actually made to him.

'Tis true, by that Statute the Commissioners have Power to assign the Bankrupt's Debts to the Creditors, and by such Assignment the Property is vested in them, and shall be recoverable by them as their proper Debts.

Sid. 338. And so is a Term for Years vested in the Assignee, by an Assignment made by the Lessor; but yet if he parts with his Interest in the Term, he must give Notice of it to him in the Reversion, or otherwise an Action of Debt will lie against him for Rent, notwithstanding he hath nothing in the Land.

Darby versus *Pittarfe*, in B. R.

London ff. ERROR on a Judgment in B. R. in an Action of Debt on a Bond dated the 26th of October, 35 Car. 2. reciting, That he had transacted several Affairs for the Defendant in Barbary, and had given him an Accompt thereof at his Return, and that the Defendant in Consideration thereof, covenanted to pay the Plaintiff and his Wife, or to one of them, 100 l. for seven Years, to commence from Christmas next ensuing, if either of them should so long live; and this was to be paid by quarterly Payments equally: Then he avers, That upon the 25th Day of September next before the Action brought, the Plaintiff and his Wife were living, and that 100 l. was then due and in Arrear for four quarterly Payments.

There was a Judgment by Default, but it was reverſed, becauſe the Bond being dated the 26th of October, 35 Car. 2. and the Action brought in Michaelmas Term, 1 Jac. 2. there was above ſix Quarters due from the Date to the Time of the Action brought; and the Plaintiff had declared only for four, and did not ſhew for which.

Death verſus *Dennis.*

Belvin. Paſ. 3 Jac. II. Rot. 358.

Eſſex ſſ. DEBT upon Bond for Perfomance of Covenants in Marriage-Articles, reciting, That a Marriage was intended between the Defendant, and Anne the Widow of Stephen Cole; and that the ſaid Anne was ſeized of ſeveral Freehold and Copyhold Lands, of the yearly Value of 80 l. for her Life, Remainder to ſuch Perſon to whom ſhe ſhould deviſe the ſame, whether ſole or married, and that the Defendant was to receive the Profits thereof after the ſaid Marriage, and during the Joint Lives of him and his Wife, &c. and that he covenanted, in Conſideration of the ſaid Marriage, to pay unto the Plaintiff 20 l. yearly, from Michaelmas next after, in Truſt, and for the Benefit of the Wife.

The Defendant pleaded Perfomance generally.

The Plaintiff replied and aſſigned the Breach, That after the Marriage he did not pay 10 l. at Lady-day, 35 Car. 2. and averred, That Anne was then living; and upon Demurrer

It was objected for the Defendant, That this 20 l. being to be paid annuatim by the Articles, but not ſaying for how long, it ſhould therefore be paid but one Year and no longer after the Marriage.

I think 'tis impoſſible a more frivolous Objection could be made; for 'tis expreſly provided by the Articles, That the Husband ſhould have the Profits of the Lands from the Marriage, during their *Joint Lives*: 'Tis therefore natural to imagine, that he intended the Payment of the 20 *l.* ſhould continue *ſo long*; and ſo it was adjudged.

Geang verſus *Swaine.*

Winford. Mich. 3 Jac. II. Rot. 174.

London ſſ. DEBT upon Bond dated the 15th of December, 36 Car. 2. The Defendant craved Oyer of the Condition, which was, That in Conſideration of 12 l. &c. paid to the Defendant, he agreed to pay the Plaintiff 12 l. (but without Intereſt)

tereſt) if he lived a Month after the Date of the ſaid Bond; & in Default of Payment thereof, then he was to pay 14 l. to him, if he ſhould live ſix Months after that Day: Then he pleaded, That after the ſix Months he paid the Plaintiff 8 l. &c. and that he entered into a Bond of the Penalty of 20 l. conditioned to pay 10 l. on a certain Day in full Diſcharge of the Bond, upon which this Action was brought; and that the Plaintiff did accordingly accept the ſaid Bond.

Upon Demurrer to this Plea it was held to be ill; for admitting one Bond might be given in Satisfaction of another, which is contrary to the Books, yet it cannot be given after the other is forfeited, (as it was in this Caſe) becauſe after the Forfeiture the Penalty is veſted in the Obligee, &c. A leſſer Sum (as this was, viz. 10 l. cannot be a Satisfaction for a greater.

There are many Caſes cited here, but in a confuſed manner; and I cannot help taking Notice in this Place, That it ſeems a Vanity peculiar to Common Lawyers, to cite Caſes only to amuſe one another; it cannot be to ſhew their Reading, becauſe 'tis eaſily to be done with the help of an Index; and I am ſure 'tis not to ſhew their Underſtanding, becauſe ſo few Caſes are cited to the purpoſe.

The Queſtion in this Caſe was, Whether one Bond can be given in Satisfaction of another which was forfeited? And it was held it could not.

1 *Mod.* 225. Now to prove it the 1 *Mod. Rep.* was cited, which was Debt upon Bond againſt the Defendant as Heir, *&c.* He pleaded, That his Anceſtor the Obligor died inteſtate, and that a Stranger had adminiſtred, who had given the Plaintiff another Bond in Satisfaction of the former: The Defendant had a Verdict, and in Arreſt of Judgment this Diſtinction was made, That if the Obligor who gave the firſt Bond, had likewiſe given the ſecond, it would not have diſcharged the firſt; but the ſecond Bond being given by an Adminiſtrator, it mended the Security, for by that means he became chargeable *de bonis propriis*; and for that Reaſon the ſecond was held to be a Diſcharge of the firſt Bond.

3 *Lev.* 55. *Cro. Car.* 85. *Acceptance of one Bond can't be pleaded in Satisfaction of another.* In 3 *Levinz* it was adjudged directly contrary; for there a ſecond Bond was pleaded by an Executor, as given by him in Diſcharge of the firſt Bond of the Teſtator; and upon Demurrer the Plaintiff had Judgment, becauſe one Bond could not be given in Satisfaction of another: And yet the Book takes Notice, That the ſecond Bond charged the Defendant *de bonis propriis*, when by the firſt he was only charged *de bonis Teſtatoris*.

Moor 573. Nº. 787. *I know not what he means by* Nº. 667. The Caſe cited in *Moor* is nothing to the Purpoſe, *viz.* It was Debt on Bond: The Defendant pleaded, That, *before the Day of Payment*, they came to a *Parol Agreement*, That if the Defendant would deliver up ſome Cattle which he had taken Damage-feaſant, and releaſe the Treſpaſs, and pay the Money to another on ſuch a Day, that the Bond ſhould be void; and averred, That the Action was brought on the Bond before that Day came; and the Plea was ill, becauſe the Agreement was by Parol.

There are two more Caſes cited out of *Croke*, and neither of them relating to this Matter. *Cro. Car.* 19, 192.

The firſt is, in Conſideration the Plaintiff would accept 12 *l.* in Diſcharge of all Reckonings, *&c.* and ſeal an Acquittance to the Uſe of *T.* the Defendant promiſed that *T.* ſhould ſeal another to the Plaintiff; and alledged, that he accepted the 12 *l.* and delivered an Acquittance to one *Smith*, to the Uſe of *T*; but that the Defendant had not procured *T.* to ſeal another to the Plaintiff.

It was objected, That the Plaintiff ought to have ſet forth what Acquittance he had ſealed, that the Court might judge whether it was good or not; he only alledged, that he ſealed and delivered it to *Smith*; who being a mere Stranger, 'tis probable he did not deliver it to *T*; and for theſe Reaſons that Declaration was held ill.

The other is Debt upon Bond; the Defendant pleaded, That by a *certain Deed* it was agreed between them, That the Defendant ſhould convey ſome Lands to his Creditors, to be ſold by them, and that the Money ariſing by ſuch Sale ſhould be divided amongſt them, and that he ſhould aſſign a Leaſe of the Cuſtoms of ſome *French* Wines, and do ſome other Things, which the Creditors *accepted*; and alledged only, that he had conveyed the Lands, *&c.* And upon Demurrer the Plea was held ill: Juſtice *Croke* tells us, it was becauſe the Deed ſounded in Nature of a Covenant; which is a Sort of Jargon, intelligible only to Lawyers; the Meaning (if it has any) is, That a Duty which is certain, and which accrews at the very Time of the making the Deed it ſelf (as it doth upon the Sealing and Delivery of a Bond to pay Money) ſhall never be avoided by a Deed of Covenants, becauſe the Breach of thoſe Covenants is ſatisfied only by Damages given; which are in their own Nature incertain, and therefore cannot be pleaded in Satisfaction of a Duty which is certain. *Cro. Car.* 192. *This is to be ſeen in* Blake's *Caſe*, 6 Rep. 44.

My Lord *Rolle*, who reports the ſame Caſe, doth not mention whether the *Agreement* was in Writing or not, but tells us it was, that the Obligor ſhould do ſeveral Things; and among the reſt, that he ſhould aſſign his Intereſt in the ſaid Cuſtoms, *&c.* and that the Defendant pleaded Performance *of all*, and ſhewed how; and that the Caſe was not adjudged upon a Demurrer, but that the Defendant had a Verdict; for he ſays, that it was moved in Arreſt of Judgment: And it appearing to the Court that the Defendant had no Power to make an Aſſignment of the Cuſtoms, therefore the Judgment was arreſted; for ſuch a Plea could not be a good Diſcharge of the Bond, becauſe this Agreement was like an *Accord*; which muſt be performed in all, or 'tis void.

Then follows the Diſtinction made in *Peyto*'s Caſe, That where a Condition of a Bond is to do a *collateral Act*, as to deliver a Horſe, there an Accord to make Satisfaction by paying Money is no good Plea, becauſe the Contract being to deliver the Horſe, cannot be altered but by Writing; but when the Condition is to pay Money, there an Accord to make Satisfaction by giving or delivering any other Thing inſtead of Money is good, becauſe *res per pecuniam æſtimantur*, and not *pecuniæ per res*. *9 Rep.* 79. *Co. Lit.* 212. *B.*

Now,

Now, What is all this to the Purpose to prove that the Acceptance of one Bond cannot be pleaded in Discharge of another? 'Tis true, the Case in *Cro. Car.* 85. is so; and the Cases cited in the Margent of that Case might occasion the like Citation in the principal Case, for they are exactly the same: But 'tis probable that neither he who made those References, nor the Serjeant himself, perused any of them; for if they had, it would appear they are not parallel with the principal Case.

But then it was objected, That it appears by the very Condition that this was an usurious Bond, because the Defendant was to pay 14 *l.* for 12 *l.* in six Months after the Date thereof: 'Tis true, this might have avoided the Bond; but then the * Statute ought to have been pleaded, because the Plaintiff might have the Liberty of rectifying it by his Replication.

As for Instance, A Man became bound on the 23*d Day of May, Anno* 1617, to pay 120 *l.* principal Money, and 12 *l.* for Interest, on the 24*th Day of May next ensuing*: Now, If those Words *next ensuing* shall refer to the very same Month of *May*, then 'tis a plain usurious Contract, because the Defendant was to pay 12 *l.* for the Interest of 120 *l.* for one Day; the Bond being dated on the 23*d of May*, and the Money being to be paid on the 24*th Day of May next ensuing*; but if the Defendant had pleaded the Statute of Usury, the Plaintiff might have replied, and shewed the Truth of the Case, *viz.* That it was agreed between him and the Defendant on the 23d of *May*, 1617, that he should lend the Defendant 120 *l.* for a Year next following, upon Security to pay the said principal Sum and 12 *l.* for Interest upon the 24*th Day of May*, 1618, and that he lent the Money accordingly; and that the Scrivener who made the Bond, did mistake the Agreement, and made the Money payable on the 24*th Day of May next ensuing*.

Judgment was given for the Plaintiff in the principal Case.

* 13 Eliz. cap. 8. *the Lender was to take* 10 l. per Cent. *and no more.* Per 21 Jac. 17. *he was to take* 8 l. per Cent. Per 12 Car. 2. cap. 13. *he is to take six and no more.*

Mason versus *Fulwood*.

Belvin. Trin. 4 Jac. II. Rot. 382.

London, ss. DEBT on a Bond; the Condition whereof was, That whereas the Plaintiff, at the Request of one Collet (for whom the Defendant was bound) had lent him 30 *l.* upon the Adventure of his Life: If therefore the said Collet, or his Assigns, should pay unto the Plaintiff 32 *l.* 10 *s.* at the End of one Year, or any sooner Time, after three Months from the Date of the said Bond, and according to the Rate of Six-pence in the Pound per Month, after the said three Months, for every Month expired at the aforesaid Time of Payment; and if Collet should die within the said Year, and before the Payment of the Principal and Præmium, then the Bond to be void.

The Defendant pleads, That Collet desired one Letten to lend him 30 l. and thereupon it was corruptly agreed between them, that Collet should pay Letten 2 l. 5 s. for the Interest thereof for three Months, and after the Rate of Six-pence per Month per Pound for a Year, if Collet should so long live; that Letten supplied the 30 l. for one Year, and that the Defendant and Collet became bound to the Plaintiff Mason for the Payment of the Money to Letten; that Collet paid the Plaintiff 9 l. for the Interest of 30 l. for one Year, being after the Rate of Six-pence per Pound per Month; that for continuing the Money in the Hands of Collet, it was agreed between Letten and him, after the first Year, that the old Bond should be cancelled, and a new one given, with the same Condition, for another Year, if Collet should so long live; and that the Defendant should become bound in that Bond; that this exceeded the Interest of six Pounds in the Hundred for a Year, and so the Bond was void; and upon Demurrer to this Plea

The Serjeant, for want of a better Report, tells us, That his Brother Baldock argued for the Plaintiff, and Serjeant Pemberton for the Defendant; but no Judgment was given: And to prove that the Contract was *not* usurious, these Cases were cited; and he begins with one where the Contract was held to be usurious.

It was between *Roberts* and *Tremaine*, *viz.* *A.* lends *B.* 150 l. for two Years; and for securing the Payment of it at that Time, he demised certain Lands to *A.* for a Term of Years, which was to commence after the said two Years; but was to be void, if the principal Sum was then paid: And it was agreed between them, that for Forbearance of the said 150 *l.* for two Years, *B.* was to pay *A.* an Annuity of 22 *l.* 10 *s.* quarterly, for the said two Years, if *A.* lived so long; and it was held, that this was an usurious Contract; for tho' it was objected that it was a casual Bargain, because *A.* might die before any Part of the Annuity became payable; and so *B.* might keep the 150 l. for two Years, without paying any Thing for Interest; yet it was adjudged, that it might reasonably be intended he should live beyond that Time; and there was an apparent Possibility that he might receive that Consideration for lending the Money, which is usurious and void by the Statute. 2 *Rol. Rep.* 47. 2 *Cro.* 507.

The other is in *Moor* 752, which is nothing to the Purpose; it was an usurious Contract, to pay more than 10 *l.* in the 100 *l.* The Creditor assigned the Debt to another, to whom he was indebted, and the Debtor became bound to the Assignee; which Bond he accepted in Satisfaction of a good Debt, being ignorant of the usurious Contract; and whether that last Bond was void or not was the Question? And held it was not.

These are the two Cases cited to prove the Contract in the principal Case *not* to be usurious.

In the next Place, there are some Authorities to prove that it was usurious; and amongst the rest, the Case of *Roberts* and *Tremaine* was one, which was cited before, to prove it *not* usurious.

*5 Rep. 69, 70. Cleiton's Case.

Then he mentions * *Burton*'s Case; but I ſuppoſe he means the Opinion of *Popham* in that Caſe *obiter*, *viz.* That where the Principal is well ſecured, and extraordinary Intereſt to be paid upon the Contingency of a Life, 'tis uſurious.

He muſt mean this or nothing, for the Contract in *Burton*'s Caſe was not uſurious, *viz.* It was an Agreement made the 17th of *July*, 1579, that *A.* ſhould lend *T.* 100 *l.* and in Conſideration thereof, *T.* ſhould grant to *A.* and his Heirs an yearly Rent of 20 *l.* to be paid at *Chriſtmas* and *Midſummer*; the firſt Payment to be made at *Chriſtmas* 1580, but under a Condition, that if *T.* pay the 100 *l.* on the 17th of *July*, 1580, that then the Rent ſhould ceaſe: Now, here the firſt Payment of the Rent was not to be before *Chriſtmas* 1580, which was a Year and almoſt a half after the Agreement made to lend the Money, for that was in *July*, 1597; and 'tis true, that this exceeded ten Pounds in the Hundred; but yet the Contract was held not to be uſurious, becauſe, if *T.* had paid 100 *l.* on the 17th of *July*, 1580, the Rent would have ceaſed, and then he would have given nothing for the Intereſt, becauſe by the Agreement nothing was to be paid till *Chriſtmas* following; ſo that this ſeemed to be a Purchaſe of the Rent; for the Lender was not certain of any Recompence for the Forbearance of the 100 *l.* which is eſſential to an uſurious Contract, and agreeable with the Definition of the Word *uſura*; for that is *commodum certum quod recipitur propter uſum rei mutuatæ.*

Now in turning over theſe Caſes, I find this Diſtinction made in the Books: *ff.* Where the Principal and Intereſt are both in Hazard, there the Contract for extraordinary Intereſt is not uſurious: But where the Principal is well ſecured, and the Intereſt only is hazardous; there 'tis otherwiſe; which doth not very well agree with the Definition above-mentioned.

Ball verſus *Richards.*

Tempeſt. Hill. 3 & 4 Jac. II. Rot. 491.

Midd. ff. DEBT upon Bond, conditioned to ſave the Plaintiff harmleſs, who was bound in another Bond for the Defendant (being a Collector of the Rents of the Governor and Company of the New-River-Water) the Condition of which Bond was, That the Defendant ſhould pay the Money collected, &c. unto the Treaſurer of the ſaid Company within a Month after he ſhould receive it.

The Defendant pleaded non damnificatus.

The Plaintiff replied, That the Defendant had received 1300 l. for Rent due to the Governor, &c. and that he had not at any Time hitherto paid it to the Treaſurer, &c. ſecundum formam & effectum Conditionis, &c. That the Plaintiff afterwards, viz. the 21ſt of

April, was threatned to be ſued, and thereupon he was forced to agree with the Company to pay the Money, and ſo was damnified; and upon Demurrer, it was objected to this Replication,

That the Breach was not well aſſigned, becauſe it did not appear that the Defendant had received the Money within a Month before the Action brought; and if ſo, the Plaintiff had no Cauſe of Action.

The Anſwer was, That the Plaintiff had alledged that the Money was not paid hucuſq; ſecundum formam Conditionis, &c. which was a ſufficient Affirmation that he had received it a Month before the Action brought, and had not paid it within that Time, eſpecially ſince it appeared to be unpaid the 21ſt of April; and the Action was brought in Hillary Term preceding.

But this Anſwer was held inſufficient; for the Plaintiff ſhould have alledged, That the Defendant on ſuch a Day, viz. for the Space of a Month before the Action brought, had received the Money, and had not paid it; for ſuch a general Allegation that he had not paid it ſecundum formam Conditionis, is not good where the Condition is ſpecial, as this was.

And to prove this, ſome Caſes were cited; as *Dyer* 243. *B.* which was Debt on a Bond to perform an Award, ſo as it was made and delivered by the Arbitrators *in Writing*, *at or before* the 23d Day of *July*.

The Defendant pleaded, That the Arbitrators did not deliver their Award in Writing before the 23d of *July*.

The Plaintiff replied, That before that Day the Arbitrators had taken upon themſelves to make an Award, and by their Award *in Writing*, and delivered by them to the Parties *ſecundum formam & effectum Conditionis præd'*, *&c.* it was order'd, *&c:* And upon Demurrer, the Replication was held ill, becauſe it did not directly anſwer the Plea; for that was that the Arbitrators did not deliver their Award *in Writing*; and the Replication was, that they delivered it *ſecundum formam Conditionis*.

This ſeems to be a very great Nicety; and my Lord *Dyer*, who reported that Caſe, was of Opinion that the Replication was good, and cited the Year-Book 6 *H.* 7. to juſtify it; which was thus, *viz.* *That Advice ſhould be given by Counſel*: And the Defendant pleaded, That *Counſel did not give Advice*, and held good; for both are Sentences alike, and of the ſame Signification, tho' the Words are not the ſame. 6 *H.* 7. 4.

'Tis true, 'tis a ſure Way to plead according to the very Words of the Condition, and not to ſay that the Thing was performed *ſecundum formam Conditionis*; and ſo is the Caſe in 1 *Lev.* 145.

And 'tis generally true, that the Breach as well as the Performance ought to be alledged in the very Words of the Condition; for if 'tis in the Disjunctive, *viz.* to deliver a Thing *at or before* ſuch a Day, 'tis not ſufficient to ſay, that it was not deliver'd before the Day; and ſo is the Opinion of my Lord *Dyer* in the Caſe above-mentioned.

The

The Serjeant cites 2 *Saund.* 188. which is not much to this Purpose; it was Debt on a Bond to perform an Award.

The Defendant pleaded *nullum arbitrium.*

The Plaintiff replied; and shewed an Award ready to be delivered to the Parties.

The Defendant rejoined, That the Award was not tendered to him on the Day, *&c. et hoc paratus est verificare:* Now this Rejoinder was held ill for two Reasons; first, because it was a plain Departure from the Plea; for that was *nullum arbitrium factum, &c.* and the Rejoinder was, that it was not *rendered*, which implies it was *made*: The other Reason was, because it was ill concluded; for the Replication was, that the Award was ready to be delivered, *&c.* and the Rejoinder says it was not; which makes a plain Issue, and so ought to conclude to the Countrey.

But as this Case doth not relate to the principal Case, so the Serjeant hath mistaken his own Report of the Case of *Lamplugh* and *Shiers*; which he tells us is *apres* in his Book, when 'tis above 100 Pages *before*, *viz.* Folio 351.; and he is not only mistaken in the Page, but in the Case it self; for when you have found it, there is not a Tittle to this Purpose, either there, or in *Winch's Entries*, 302, 303.

Cro. Eliz. 281. The Page in *Cro. Eliz.* is likewise mistaken; for 'tis 281, and not 381, between *Fox* and *Lee*: And there a Plea of Payment *secundum formam Conditionis, &c.* was held good; but it was after a Verdict.

Helme versus *Hill.*

Winford. Hill. 3 & 4 Jac. II. Rot. 1220.

York, ss. DEBT upon Bond, conditioned to perform Covenants in an Indenture of Apprenticeship for 7 Years to the Trade of a Mariner.

5 Eliz. cap. 5. paraf. 12. The Defendant pleaded the Statute 5 Eliz. by which 'tis enacted, That all Owners of Ships, &c. and all Houlholders using the Trade of the Seas by Fishing or otherwise; and every Gunner, commonly called a Canoner, (in the Book 'tis *communiter vocat' Outoonar, Anglicé Outoners*; which must be a Word of the Serjeant's inventing, for 'tis not to be found in any Language used amongst us;) and every Shipwright, may take and keep one or more Apprentices to be brought up in that Trade, and to be bound for ten Years or under; and every Apprentice so taken, and being above seven Years old, shall be bound by the same Covenants as are used, according to the Custom of London, so as the Covenant or Bond of Apprenticeship be made in Writing, indented and inrolled in the Town where the Apprentice shall be then dwelling, if 'tis in a Town-Corporate; and if not, then to be enrolled in the next Corporate-

Town to the Habitation of such Apprentice: Then he pleads, That the Apprentice lived in a Village not corporate, and that Scarborough was the next Corporation, and that the Master was a Mariner, and the Apprentice above seven Years of Age when he was bound, and that the Indenture was not inrolled in Scarborough, or in any other Corporation.

The Plaintiff replied, That the Apprentice deserted his Service before the End of the Term; and to this Replication there was a Demurrer, but it was never argued.

Nicholls versus *Tymms*.

Cooke. Trin 3 Jac. II. Rot. 723.

Stafford, ss. A Lease for 99 Years was made to one Thomas Walton, if three Lives should so long live, under the yearly Rent of twenty Shillings; and an Action of Debt for Rent was brought by the Grantee of the Reversion, against the Assignee of the Term: And upon a Demurrer to the Declaration, the Plaintiff had Judgment, because the Defendant did not argue his Demurrer.

But the Serjeant has a Nota upon it: ss. That the Plaintiff had a Title to the Rent as an Assignee of the Reversion, and therefore he ought to be named so in the Writ; and so are all the Precedents: But he doth not mention where any one is to be found; but I may venture to tell him where there is one; and the Plaintiff is not named as Assignee in the Writ; and that is in *Co. Ent.* 48.

Crotch versus *Crotch*.

Cooke. Trin. 3 Jac. II. Rot. 310.

Norfolk, ss. DEBT upon Bond brought against the Defendant as Executrix of Edward Crotch; the Condition was, That the said Edward, his Heirs and Executors, should pay unto the Plaintiff Robert Crotch, for the Use of his Daughter Anne, the Sum of five Pounds, at a certain Time limited in an Indenture, bearing even Date with the Bond.

The Defendant pleaded, That by the said Indenture Robert Crotch did enfeoff one Henry Turner and his Heirs to the Use of the Testator and his Heirs; and that the Testator covenanted by the said Indenture to and with the said Robert Croth to pay unto him the Sum of five Pounds, for the Use of his Daughter Anne,

within two Months after the Death of John Bowe, who was then alive.

And upon Demurrer to the Plea, it was objected, That the Defendant ought to have produced the Deed in pleading by a profert hic in Curia, &c. and that he must have done it, if the Bond had been for Performance of Covenants: Now in this Case, it was to perform one, viz. to pay the Money; which, as to this Purpose, is the same Thing as if it had been to perform many Covenants.

If the Party himself had been living, he must have produced the Deed, and so must his Executrix, who represents him, because 'tis pleaded as an Excuse for Non-payment of the Money; and if it should be otherwise, then he might only fancy a Deed and suggest it; and if 'tis never produced, then the Court can never make any Judgment whether 'tis real or not: 'Tis like the Case in Litt. ſſ. Where two commit a Trespass, and one has a Release, and then an Action is brought against the other, he may plead this Release; and because he is to have an Advantage by it, he must have it in Poigne, that is, he must plead it with a profert hic in Curia; tho the Deed it self belongs to another.

Litt. Sect. 376.

But in the principal Case, the Court were of a contrary Opinion for that very Reason, viz. Because the Defendant was not only a Stranger to the Deed, but because it belonged to the Feoffee; and she could not oblige him to produce it; so that without his Consent, she being an Executrix, it was impossible for her to shew it to the Court.

Dyer 277. *pl.* 58. *Cro. Car.* 441. And this is proved by the Case in *Dyer*, which was a Formedon in Remainder; setting forth, That one *Egglefield* settled the Lands on Feoffees, to the Use of himself and the Heirs of his Body; and in Default thereof, to the Use of *Christopher* and his Heirs; that *Egglefield* died without Issue, and that the Right descended to the Demandant, as his Cousin and Heir.

The Tenant craved *Oyer* of the Deed, and that it should be *produced* in Court; and upon Demurrer, it was adjudged, that the Demandant ought not to *produce* it, because the Remainder might commence without Deed; and admitting there was a Deed, yet it did not belong to him, but to the Feoffee.

There is a Difference where a Deed is pleaded by one who is privy in Estate, as by a Feoffee or Lessee for Years, claiming a Right in the Lands; and where 'tis pleaded by a Stranger, who claims no Manner of Right in the Thing granted, but alledges it only by Way of Excuse; for in the first Case all the Books agree he must produce the Deed by a *profert hic in Curia*, but in the other Case he need not.

'Tis true, the Text in *Littleton* above-mentioned is, That if two commit a Trespass, and one has a Release, and then the other is sued, he may plead this Release, and that it must be with a *profert hic in Curia*, tho' the Deed belongs to his Companion; but the Reason is not because he claims any Right by this Release, but because they were both Parties to a Wrong; and in such Case, the Law will not favour the one to take any Benefit by an Act done to the other, without shewing it to the Court.

Pope verſus *St. Leger.*

Winford. Mich. 5 W. & M. Rot. 337.

Midd. ſſ. DEBT in the debet & detinet for 107 l. 10 s. being the Value of 100 Guineas, upon a Wager in Writing, concerning playing two Table-men at Back-Gammon; in which the Plaintiff declared, That he and the Defendant were at play at Back-Gammon, and that the ſaid Plaintiff threw two Fours, and moved two of his Table-men, but not from the Point whereon they ſtood; and thereupon a Wager was laid between them, viz. That the Plaintiff ſhould pay 150 Guineas to the Defendant, if by the Courſe of that Game he was bound to play thoſe Table-men which he had ſo moved, and that the Defendant ſhould pay unto the Plaintiff 100 if he was not bound, &c. to play them: That this Wager was to be decided by the Groom-Porter, and that the Defendant did acknowledge it by a Writing under his Hand and Seal, and did thereby oblige himſelf to pay unto the Plaintiff, or his Order, 100 Guineas ſo ſoon as the Groom-Porter ſhould give his Judgment, if it happened to be againſt the Defendant; that after the Groom-Porter did adjudge that the Plaintiff was not bound to play thoſe Table-men, unleſs he had removed them from the Point; that 100 Guineas were of the Value of 107 l. 10 s. of which the Defendant had Notice, but did not pay the Money.

The Defendant craved Oyer of the Writing, which was thus: *ſſ.* I *John St. Leger*, of *Donorale*, Eſq; do own that I have betted with Lieutenant-Colonel *Roger Pope* 100 Guineas againſt 150, concerning a Diſpute ariſing on the Manner of playing a Caſt at *Back-Gammon*, which is ſtated and ſigned by us both, and Captain *Francis Chantrel*, and referred to the Deciſion of the Groom-Porter; and I do by theſe Preſents oblige my ſelf, on the Word and Honour of a Gentleman, to pay unto the ſaid *Roger Pope*, or his Order, 100 Guineas ſo ſoon as the Groom-Porter gives his Judgment on the Caſe, if it happen to be againſt me, *&c.* Then he pleads the Statute of Gaming; and upon Demurrer it was objected, 1. That this Caſe was within the Statute; but it was adjudged to the contrary, becauſe it did not concern any Playing, but a Matter which was collateral to it; viz. It was a Wager which did not depend upon the Event or Succeſs of the Game, but it was purely a Thing which happened by Chance. 16 Car. 2. cap. 7.

'Tis true, the Statute expreſly prohibits ſome Wagers, but they are only ſuch which are betted by others, upon the Sides or Hands of the Players; and if any other Wagers had been intended, certainly they would have been expreſſed.

2. It was objected, That there is no Place alledged where the Groom-Porter gave Judgment; but this was diſallowed, becauſe the Defendant by Pleading the Statute had admitted that the Groom-Porter gave Judgment againſt him.

And

Hob. 82. Yelv. 11. 2 Cro. 682.

And to prove this, the Caſes in the Margent were cited; I ſhall mention but one, and that is in 2 *Cro.* where an Action of Debt was brought upon a Demiſe of Lands *apud Creek*, and of ſeveral Cloſes, but did not mention in what Vill they were: The Defendant pleaded Entry into Part of the Lands in *Creek*, which is a Suſpenſion of the Rent; and after a Verdict, it was moved in Arreſt of Judgment that the Declaration was ill, becauſe there is no Place mentioned where the other Lands were: And this was held to be a good Objection, if it had been upon a Demurrer; but the Defendant having pleaded a Collateral Plea, *viz.* Entry of the Plaintiff, admitted the Leaſe to be made of the Land, and ſo the Declaration good.

3. In the aforeſaid Writing concerning the Wager, the Parties mention a Diſpute ariſing between them on the Manner of playing a Caſt at Back-Gammon, which they ſay is ſtated and ſigned by them both, and referred to the Deciſion of the Groom-Porter: Now it doth not appear that the Caſe thus ſtated was tendered to the Groom-Porter, or that he had given Judgment thereon.

This Exception was likewiſe diſallowed, becauſe the Wager was ſet forth; and then it was alledged, That the Groom-Porter, adjudicavit in caſu præd', and that his Judgment was for the Plaintiff, and ſo was the Judgment of the Court of Common-Pleas; and thereupon a Writ of Error was brought, and it was inſiſted for the Plaintiff in Error,

1. That Debt in the debet & detinet will not lie in this Caſe for 107 l. 10 s. becauſe the Court cannot judge the Value of Guineas to be more than 20 s. a-piece.

'Tis true, by mutual Agreement by Way of Commerce they paſs for more; but that cannot inhance the real Value: And therefore the Plaintiff ought to have declared either for 100 l. or for 100 Guineas, and averred the Value.

Where an Action of Debt is brought for foreign Coin in ſpecie, 'tis never in the debet, becauſe no Man can ſay that another owes him ſo much, when the Value of what is owed is uncertain; and in debet you always recover according to your Demand.

'Tis for this Reaſon that ſuch Actions are always brought in the detinet only, unleſs you demand the Value in Engliſh Money, and then it may be in the debet & detinet; and ſo 'tis for Engliſh Coin, becauſe we know its Value, and therefore in ſuch a Caſe we never declare ad valenciam: But if an Action on the Caſe is brought on a Bill of Exchange for Guineas, the Jury may aſſeſs Damages according to the current Value; which can't be done in an Action of Debt, becauſe, as it has been often obſerved, the Recovery in that Action muſt be purſuant to the Demand.

Latch. 84.

There was another Objection, viz. That the Plaintiff averred, That the 107 l. 10 s. was not paid; but did not ſay that the 100 Guineas was not paid in ſpecie: As where in Debt the Demand was for 303 *l.* 12 *s.* upon a Bill of 1518 *Florence Poliſh*, which amounted to that Sum in *Engliſh* Coin; and the Averment was,

Raſt. Ent. 158. *B.* *Yelv.* 135. *Pop.* 28. *Cro. Car.* 515.

That

That he had not paid either the one or the other, as it ought to have been in this Case.

And for this Reason the Court seemed to incline to reverse the Judgment; but there was another Reason for which it was reversed.

1. The Plaintiff had set forth the Play, the Wager, and the Note by which they bound themselves in the Wager, upon which Note the Action was brought; but upon Oyer of that Note it appeared, That the Dispute arising between the Parties, was stated and signed by both; so the Plaintiff ought to have made that a Part of his Declaration, and to have produced it to the Court in pleading, as stated and signed by them, and not to have averred the Purport without producing it, because it was in Writing.

He should therefore have produced that Writing, in which the Case was stated and signed by them, and have averred, That the Case so stated and that in the Declaration was the same; but as the Plaintiff had set it forth there was a plain Variance between the Declaration and the Note; for he had declared that the Defendant per scriptum sigillo suo sigillat' curiæq; &c. hic ostens. had bound themselves in the said Wager; when upon Oyer of the Note there is no such Thing; for that was only to stand to the Judgment of the Groom-Porter, upon a Case stated and signed by both: And for this Reason the Judgment was reversed. 4 Mod. 410.

Elwick versus *Cudworth.*

Cooke. Pas. 5 W. & M.

London ff. THE Plaintiff in Consideration of 1100 l. to be paid unto him by the Defendant, covenanted to assign to him ten Shares in the Corporation of Linnen Manufacture, on the 30th Day of January, &c. and the Defendant covenanted, that he would then accept those Shares, and at the same Time pay the Money; and by that very Deed they bound themselves to each other in the Penalty of 2200 l. for the Performance of the said Covenants.

An Action of Debt was brought by the Plaintiff, and he assigned the Breach in not paying the 1100 l. on the Day, &c.

The Defendant pleaded, That he did not appoint any Person, either before or upon the Day, to whom the Plaintiff should assign those Shares, neither had he assigned them to the Defendant himself.

The Plaintiff replied, That he did assign the said Shares to the Defendant upon the very Day, but said no Place where, &c. And upon Demurrer there was Pretence to maintain the Replication, for it was certainly ill, there being no Venue unless the Covenants had been reciprocal; and the Performance of the one had not depend-

ed on the other; which was not this Case, where the Covenants were not mutual: For the Assignment of the Shares ought to precede the Payment of the Money, because the Covenant to pay it was in the Nature of a Condition to prevent the Penalty of 2200 l. which the Defendant was to forfeit if he did not pay 1100 l. on the Day; which Payment had no manner of Reference to the Day on which the Assignment ought to be made, but it wholly related to the Acceptance of the Assignment; so that their Meaning must be, That the Plaintiff should assign the Shares, and the Defendant should accept thereof, and that upon such Acceptance he was to pay the Money: And of that Opinion was the whole Court.

'Tis plain, That the Payment of the Money must relate either to the Assignment or the Acceptance of the Shares; and 'tis a Rule in Law, That where one Matter may have several Intendments, it shall always be expounded in the most favourable Sense for the Covenantor, if so, then the Payment in the principal Case, must relate to the *Acceptance* of the Shares, because 'tis for the Benefit of the Defendant that it should be so construed.

Now if the Plaintiff did not *assign*, 'tis impossible for the Defendant to *accept*; and certainly something was intended when he covenanted to *accept*, or otherwise the Agreement on his Part was all in vain.

Dyer 17 *a.* There is a Case in *Dyer*, which the Serjeant tells us is an apt Case to this Purpose; It was Debt upon Bond, conditioned, That if *Joan Molineux* died before *Midsummer* Day, 1533. without Issue Male of her Body, *&c. then* living, that then the Bond was to be void: And the Defendant pleaded, That before *Midsummer* Day she did *die* without Issue Male *then* living. The Question was, Whether the Adverb *Tunc* should relate to the *Day* or to the *Death* of *Joan*: It was agreed, that it might relate to either; but because it happened that she had a Son living at her Death, which Son died before *Midsummer*, therefore the Words *tunc vivente* shall relate to that Day, and not to her Death, because 'tis most beneficial for the Obligor that it should be so.

Hilton versus *Smith.*

Cooke. Hill. 2 W. & M. Rot. 739. C. B.

York ss. DEBT for 315 l. upon Articles of Agreement under Hand and Seal, which were, *ss.* Memorandum, on the 14th Day of February, 1687. *Imprimis*, 'Tis covenanted by *T. H.* and *John Smith*; Whereas T. *H.* hath covenanted by Vertue of these Presents, concluded and articled all his Lands to *J. S.* and his Heirs. *Item*, for the Sum of 315 l. the one Half to be paid the 2d of February, &c. *Item*, The said *J. S.* then to enter; the other Half to be paid the 2d of February following; and they bind each other to forfeit 40 l. if they do not perform the Articles.

The Defendant pleaded, That the Plaintiff had not made a good Conveyance of the Lands to him, nor had permitted him to enter: And upon Demurrer it was objected,

1. That the Words in these Articles would not amount to a Covenant for the Plaintiff to convey, &c. because they were in the Preter Tense, viz. Thomas Hilton, hath covenanted his Lands to J. S. and so if he is compelled to pay the Money he is without Remedy if the Plaintiff should refuse to convey.

But it was answered, That the Preter Tense shall be taken for the Present Tense, ut res magis valeat; especially in this Case, because the Articles were, 'Tis covenanted; and though in another Place the Words are, ff. Hath covenanted; yet 'tis by Vertue of these Presents, which are Words de præsenti.

There were two Cases cited to prove this, viz. 1 *Leon* 26. & *Moor* 31. The first was in an Action of Debt, the other was in a Will; where Words which in a Grammatical Sense, import a Time past, shall be taken as spoken of the present Time.

But I think the Serjeant should have told us which of the Preter Tenses he means; for if 'tis the Preterimperfect Tense, then 'tis no Objection, because that imports a Time not perfectly past.

2. It was objected, That the Words were insensible, and did not oblige the Plaintiff to convey, &c. ff. T. H. by Vertue of these Presents, hath covenanted his Lands to J. S. and his Heirs.

But it was replied, That upon the whole Frame of the Sentence it was plain, the Parties intended that the Defendant should have the Lands, because he was to pay the Value, and enter upon a Day: Now he could not have the Lands without a Conveyance.

And to prove that the Words in this Agreement amounted to a Covenant to convey, the Case of *Pordage* and *Cole* was cited; which was thus. *ff. 'Tis agreed upon by* J. P. *and* B. C. *that the said* B. C. *shall give unto* J. P. 500 l. * *for all his Lands, &c.* In an Action of Debt brought upon this Note, the Objection was, That the Plaintiff did not aver that he had conveyed the Lands, or tendered a Conveyance, *&c.* which ought to be done before the Action brought for the Money, because otherwise he might recover the Money, and then the Defendant had no Remedy to obtain the Land, if the Defendant should refuse to convey, *&c.* But the Court was of another Opinion, because where both Parties seal a Note or an Agreement, each hath a mutual Remedy, by an Action of Covenant for Non-performance of that Agreement. 1 *Saund.* 319.

* *The Proposition* pro *doth not make it a Condition precedent.*

3. Then it was objected, That the Word Whereas in the Beginning of these Articles, made the whole to be no more than a Recital.

But it was answered, That it was an impertinent Word, and would not make the whole a Recital, because the very next Words are, ff. T. H. by vertue of these Presents hath covenanted.

There was a Case cited, to prove that Words shall be rejected which are placed in a Deed, so as to make it senseless or repugnant. *ff.* There was a Grant of a Rent-Charge to Husband and Wife, which *Vaugh.* 175.

which was to *commence after the Death* of *Anne Greaves* or *Tho. Greaves*; and there was a Clause in the Deed, That if the Rent be behind, &c. it shall be lawful for the Grantees to distrain at any Time during the *joint Lives* of the said *A. G.* and *T. G.* Now it was impossible that the Rent should be behind during their *joint Lives*, because it was not to commence till after the Death of one of them; and therefore those Words were rejected.

Some Cases were also cited to prove, That the Plaintiff was obliged to convey the Lands before the Payment of the Money; for there was no Condition precedent in these Articles, but the Agreement on each Side amounted to a mutual and reciprocal Covenant; upon which each of them might have a several Remedy for Non-performance.

ff. B. covenanted to enfranchise a Copyhold, and the Copyholder covenanted to pay Money in Consideration of the *same performed*; if it had been in Consideration of the same *to be performed*, then the Covenants had been mutual.

2 *Leon* 211. 3 *Leon* 219. *idem.*

G. and others, Owners of a Ship, covenant with *P.* and *G.* to let it to Freight to *P.* for the use of *B.* and the said *G.* and others covenant with *B.* That the said Ship shall proceed in her Voyage to such Ports; and covenanted with *G. &c.* That *B.* should load the Ship at such Ports; and that *B.* should pay 147 *l.* for the whole Freight. In this Case *G.* may have an Action of Covenant against *B.* for the Money, without Averment of the Performance on his Part; because 'tis not a Condition precedent, but a distinct Covenant on either Side.

1 *Roll's Abr.* 414. *'Tis also reported in* 1 *Bulst.* 167. *to the contrary.*

Wethersby & al' versus *Benefice.*

Winford. Hill. 4 & 5 W. & M. Rot. 1421.

Suffolk ff. DEBT upon Bond brought by the Plaintiffs as Bailiffs of the Borough of Dunwich: The Condition was, For the Defendant to appear at the next Quarter Sessions of the Peace to be held for the said Borrough, to answer to an Indictment of Trespass found against him.

The Defendant pleaded, That he was committed to Prison by Covin of the Plaintiffs; and there detained until he sealed the Bond.

*6 Januarii. The Plaintiffs replied, That at a Sessions of the Peace held for the said Borough, the Defendant was indicted for a Trespass by him committed in the Plaintiffs Close; and that he suffered two great and deep Pits to lie open in his own Close, without Rails; and that he pulled down an ancient Windmill, which was built at the Costs and Charges of the said Bailiffs, &c. and which was repaired by them as often as there was Occasion; and for enclosing the Highway, &c. That a † Capias was awarded against him, directed to the Serjeant at Mace, returnable at the next Sessions,

† 6 Junii.

who before that Time || arrested the Defendant, and kept him in Custody till he gave Bond to appear at the next Sessions, &c. And upon Demurrer to this Replication it was objected, || 26 Augusti.

That the Plaintiffs had no Authority to take a Bond in their own Names for an Appearance at the Sessions; but it should have been a Recognizance in the Name of the King.

The Objection requires a better Answer than a *non allocatur*: 'Tis true, 'tis the usual Practice for Justices of the Peace to take Recognizances for Appearances at the Sessions, *&c.* And these are always taken in the Name of the King, but then 'tis before Indictment found; and 'tis as true, That after the Party is indicted, and 'tis found by the Jury, a *Capias* issues out against him to compel his Appearance at the third Sessions after the Trespass committed; which Process is in the Name of the King directed to the Sheriff, and *Teste* by the Justice: But where the Trespass is done in a peculiar Jurisdiction, as in a Borough, there the Process is directed to the Serjeant at Mace; and as the Sheriff may take a Bond for Appearance in the County at large, so the Bailiffs of a Corporation may take such a Bond for an Appearance to answer a Trespass done within their Limits, which is this very Case.

Girle versus *Field.*

Cooke. Mich. 3 W. & M.

London ff. DEBT upon Bond, conditioned for the Payment of 50 l. with Interest on the 2d of March, 31 Car. 2.

The Defendant pleads in Bar, That after the making the Bond he entered into another to the Plaintiff, of the same Penalty, and for the Payment of the like Sum, as in the first Bond, which the Plaintiff accepted in full Discharge and Satisfaction of the first.

And upon Demurrer to this Plea the Plaintiff had Judgment; because the Defendant did not alledge, That he gave the second Bond in Satisfaction of the first; but only that the Plaintiff had accepted it as such.

I wish the Serjeant is not much mistaken in this Judgment, as Serjeant *Jen--r* was, who drew this Plea; for I would fain know where 'tis to be found, That giving one Bond in Satisfaction of another hath been held good.

I am so far of the Mind of that notably learned Serjeant who drew this Plea, that it seems more material for the Obligor to plead, That the Obligee accepted the second Bond in Discharge of the first, than for him to alledge, That he *gave* it in Satisfaction; for the Act is not modified by the Giver but by the Receiver, according to that known Rule, that *quicquid recipitur, recipitur ad modum recipientis.*

'Tis for this Reaſon, That if the Obligor pay a leſs Sum *before the Day* limited in the Condition for the Payment of a greater Sum, and the Obligee receives it, 'tis a good Satisfaction of the Bond; not becauſe the Obligor *gave* it in Diſcharge, *&c.* for 'tis plain, a leſs Sum cannot be a Satisfaction for a greater; but 'tis becauſe the Obligee *received* it as ſuch.

Moor 872. *Cro. Eliz.* 304, 716, 727. *Hob.* 68, 69. 2 *Cro.* 579. *Cro. Car.* 85, 86.

But all the Books agree, That the *ſame Obligor* cannot *give*, neither can one Bond be *accepted* in Satisfaction of another; becauſe the giving the ſecond Bond is not an actual Payment of the firſt; for if the ſecond ſhould be forfeited, the Obligee muſt have Recourſe to an Action at Law to recover the Penalty, which doth not diſcharge the old Bond.

1 *Mod.* 225. * 3 *Lev.* 55.

'Tis true, it hath been held, That if the Adminiſtrator of an Obligor give a new Bond, 'tis a good Diſcharge of the other, becauſe the Security is mended; for the Adminiſtrator becomes chargeable *de bonis propriis*, and yet this hath ſince been * denied to be Law.

Rook verſus *Clealand*.

Trin. 6 W. & M. Rot. 1508.

Devonſhire ſſ. DEBT upon Bond brought by the Plaintiff as Adminiſtratrix, againſt the Defendant as Aunt and Heir of Elizabeth Clealand, who was Daughter and Heir of Benjamin Clealand the Obligor.

Upon Riens per diſcent pleaded, the Jury found a Special Verdict, the Subſtance whereof was,

ſſ. That Anne Head being ſeiſed in Fee of Lands, &c. married Thomas Clealand, who had Iſſue Benjamin the Obligor, and Heſter the now Defendant.

That Anne died ſeiſed, and that her Husband ſurviving, became Tenant by the Curteſie.

That Benjamin, the Son of Thomas and Anne, being entitled to the Reverſion in Fee, entered into this Bond in the Life-time of his Father; and had Iſſue Elizabeth his only Child, and died, his Father ſtill living.

That the Reverſion in Fee deſcended upon the ſaid Elizabeth, who died ſeiſed, after whoſe Death it deſcended to the Defendant Heſter, as Aunt and Heir of the ſaid Elizabeth, viz. Siſter of Benjamin, who was Father of Elizabeth.

The Queſtion upon this Special Verdict was, Whether the Defendant, as collateral Heir, was well charged by this Declaration?

'Tis plain ſhe had nothing by Deſcent as immediate Heir, and therefore it was argued for her, That where the Anceſtor enters into a Warranty, it ſhall not bind the Heir to render in Value any

Lands which did not deſcend to him from the immediate Anceſtor, who entered into that Warranty.

'Tis true, this was the Opinion of *Thorpe*, who was Chief Juſtice of *B. R. Anno* 24 *Edw.* 3. The Caſe is not very clearly ſtated by the Serjeant, as 'tis in the Year-Book, and therefore I ſhall ſtate it as 'tis there. 24 *Ed.* 3. *fo.* 47. *a.*

Sſ. *Thorp*, *arguendo*, ſaid, That if the *Grandfather* made a Leaſe for Life, and died ſeized of the Reverſion; and the *Grandſon* entered after the Death of the Tenant for Life, it was his Opinion, That he ſhall not render this Land in Value upon any *Warranty* made by his *Father*, becauſe he was never actually ſeized of the Land it ſelf, but only of the Reverſion.

But this was only an Opinion *obiter*, and not relating to the Queſtion then before the Court; and my Lord * *Brook*, in abridging the Caſe, makes a *Quære* upon it, for he tells us, That the *Reverſion* was Aſſets, *ſicut alibi dicitur*; but where we are ſtill to ſeek. *Tit. Aſſets.* 19.

Since this Caſe it hath been held, That a collateral Heir is chargeable, but then the Declaration muſt be Special, and he muſt be charged as ſuch, and not as immediate Heir, as thus. Sſ. *A.* and *B.* were Brothers; *A.* entered into a Bond and died, leaving a Son, who afterwards died without Iſſue. An Action of Debt was brought upon this Bond againſt *B.* as Brother and Heir of *A.* the Obligor, which he was, but Uncle and Heir to the Son; and for that Reaſon Judgment was given againſt him. *Cro. Car.* 151.

So likewiſe Debt was brought againſt *C*, as Daughter and Heir of *D.* She pleaded *Riens per deſcent* from *D.* and the Jury found a Special Verdict, *viz.* That *D.* was ſeized in Fee and had Iſſue; the Defendant died, leaving his Wife with Child of a Son, who was afterwards born, but died within an Hour: The Plaintiff could never recover upon this Declaration, becauſe *C.* the Defendant ſhould have been ſued as Heir to her Brother, who died laſt actually ſeized of the Fee, which was immediately in him as ſoon as he was born.

So if there is a Reverſion in Fee, expectant upon an Eſtate Tail, which is afterwards ſpent, and the Fee deſcends upon a collateral Heir, he muſt be ſued as Heir to him who was actually ſeized of the Fee; but in ſuch Caſe he may be ſued without naming any of the intermediate Remainders, becauſe they were never ſeized of the Fee, but of the Eſtate Tail only; and 'tis the Poſſeſſion, and not the Expectancy, which makes the Party inheritable. *Hetley* 134. 3 *Mod*, 252. 3 *Lev.* 286. *idem.*

The Serjeant as a farther Proof of this Matter, hath cited a Caſe in *Dyer*, which proves that the Law was ſo, when he wrote; it was thus, Sſ. The Obligor being ſeized in Fee entered into a Bond, by which he bound his Heirs. *&c.* and afterwards died, leaving two Sons. *Dyer* 368. *plac.* 46.

The eldeſt Son entered and died without Iſſue; then the youngeſt Son enters, and it was adjudged, That he may be ſued as Son and Heir of his Father, though there was an intermediate Deſcent of the Fee to his eldeſt Brother.

But now the Serjeant is come to the digreſſive Part of his Report; where he obſerves that which neither the Court or Counſel could

ſee;

ſee; and it was, That the Plaintiff had not alledged that the Obligor bound himſelf and *his Heirs*.

This Objection was made by him on purpoſe to ſhew his Reading by anſwering it; for he tells us, If it had been made by the Defendant's Counſel, it would not have been allowed, becauſe 'tis amendable upon theſe Authorities.

8 *H.* 6. *c.* 15. *ſſ.* In *Hutt.* 83. it was held to be amendable upon the Statute 8 *H.* 6, even after a Verdict, and a Writ of Error brought, becauſe the Omiſſion was only a Miſpriſion of the Clerk; but he ſhould have told us, That the Omiſſion was in the Imparlance-Roll, and that it was right on the Plea-Roll.

In *Litt. Rep.* 279, *Richardſon*, the Chief Juſtice, asked the Pronotaries, Whether this Fault was amendable? And they all anſwered it was, though it was not ſo clear to the Judges but the Year before; for in * *Forger* and *Sale*'s Caſe, *Jones* tells us, He was againſt the Amendment, and both he and * *Croke* (who reports the ſame Caſe) affirm, That though the Chief Juſtice inclined to the Amendment upon the firſt moving it, yet having conſidered, he afterwards doubted; and both ſay, that it was afterwards amended by Conſent, and that the Defendant had leave to plead *de novo*.

* *Jones* 199.

* *Cro. Car.* 147.

The Serjeant ſeems to explode the Reaſon given by Juſtice *Jones* againſt the Amendment, *viz.* That it was not the Miſpriſion of the Attorney, but Ignorance in the Law which occaſioned this Fault; becauſe drawing this Declaration was not the Buſineſs of an Attorney, and therefore he would preſume that it was done by Counſel, whoſe Faults in Pleading are not to be amended.

The Judge who has left this to Poſterity, was a very exact and learned Perſon; and from him we may obſerve, That about Fourſcore Years ago, it was not the Buſineſs of an Attorney to draw a Declaration even upon a Bond; the Reaſon may ſtill be the ſame, though the Practice is otherwiſe; for I do not think the Attorneys are much improved in Pleadings ſince that Time, though they are in ſomething elſe: And yet we know that now they not only draw all Common Declarations, which was not their Buſineſs formerly, but likewiſe all Special Pleas; and not only ſo, but ſome of them put Counſels Names to ſuch Pleas, and take thoſe Fees which ſhould be the Reward of their Labours.

The Plaintiff in the principal Caſe had Judgment.

Knight & Ux' verſus *Corporation of Wells.*

Tempeſt. Hill. 6 W. & M. Rot. 1098.

Somerſet ſſ. DEBT upon Bond brought againſt the Corporation of Wells, by the Name of Mayor, Maſters and Burgeſſes, *alias dict.* Mayor, Aldermen and Burgeſſes.

The

The Corporation appeared by the Name of Mayor, Masters and Burgesses, and after an Imparlance plead Non est factum, and thereupon they were at Issue, and the Jury found a Special Verdict, the Substance whereof was thus;

1. That Queen Elizabeth, by Letters Patent in the thirty first Year of her Reign, incorporated the City of Wells, by the Name of Mayor, Masters and Burgesses, &c. and by that Name to be impleaded.

That King Charles II. Anno 35. of his Reign, incorporated them again, by the Name of Mayor, Aldermen and Burgesses, &c. and appointed, That for ever hereafter, a Mayor should be elected out of the most sufficient Citizens, in such manner as directed in the Letters Patents, (but it doth not appear how that should be.)

That by Vertue of the said Charter Day was chosen Mayor of the City; who was not a Member of the old Corporation; And that he with the greater Number of the New Corporation, put the Common Seal to the Bond.

Upon this Special Verdict two Points were resolved:

1. That the Bond was good; though it was objected, That it was sealed by a Mayor de facto, and one not qualified by the last Charter to be Mayor; neither did it appear how he was chosen, for all ministerial and judicial Acts done by a Mayor only de facto are good: 'Tis true, the Corporation may displace him, but so long as he continues in Office, he hath Power to seal Bonds; and if he makes a False Return to a Mandamus, an Action lies against him.

There is a Distinction made in our Books, between a Person who usurps an Office, and one who comes in by Colour of an Election; *viz.* The Acts of the one are void, but not of the other; and therefore, where two Abbots were chosen, one by the Majority of the Monks, and the other by the less Number; and he got into Possession by Colour of that undue Election, though he was not the lawful Abbot, but only Abbot *de facto*, yet his Acts are good and shall bind: And this is the Case in the Year-Book, *9 H. 6. fo.* 32. 'tis abridged in *Brook* Tit. *Non est factum, plac.* 3.

The Serjeant hath cited the same Year-Book of *H. 6.* but hath mistaken the Page, *viz.* *2 H. 6. fo.* 32. when there are not so many Pages in that Year; but he refers us to *Brook*, Tit. *Abbe* 19. and there it appears to be the same Case as before mentioned, *viz.* *9 H. 6.* 32. *Moor* 112.

2. It was held, That the Action was wrong; because the Corporation was sued by a wrong Name, viz. by the Name of Mayor, Masters and Burgesses, which was their old Name of Incorporation, but that was changed by the New Charter, into Mayor, Aldermen and Burgesses; by which Name they ought to have been sued, and though by the alias dictus the new Name is added, viz. Mayor, Aldermen and Burgesses; that is so far from helping this Declaration, that it makes it naught, because a Corporation by Charter cannot have two Names to one and the same Purpose. 1 Roll's Abr. 512, 513.

'Tis true, it may have two Names in one and the same Grant, but then it must be to different Purposes; as to purchase by

one Name, and to be ſued by another; and ſo is 11 H. 7. 27, 28. * Cro. Eliz. 357. Jones 262: But according to my * Lord Hale's Opinion, a Corporation by Preſcription may be known by two Names; as by the Name of Burgenſes, and Ballivus and Burgenſes. Hardres 504.

This was compared to a Suit brought againſt a Man by a wrong Chriſtian Name, which is void; tho' 'tis with alias dictus.

And to prove this, ſome other Caſes are cited by the Serjeant beſides that in the Margent, *viz.* In 2 *Cro.* 640, *Edmund* was bound by the Name of *Edward*, and the Bond was ſubſcribed with his right Name; and the Jury found that it was the Deed of *Edmund*, yet the Plaintiff could never get Judgment: For tho' it was ſubſcribed by the true Name, yet that was held to be no Part of the Bond, but that *Edward* was ſtill bound. 4 Ed. 4. 24. Cro. Eliz. 897. 2 Cro. 558.

And as a further Proof of this Matter, there are two Year-Books cited, which do not concern the Name of a Man, but of a Corporation; and therefore not to this Purpoſe.

The firſt is 2 *H.* 6. and 'tis abridged by my Lord † *Brook*; and it was thus: *ff.* An Action of Covenant was brought againſt the *Commonalty of S.* who had covenanted to repair certain Mills, and who were afterwards incorporated by the Name of *Bailiffs and Commonalty, &c.* And becauſe they were ſued by the Name of the Commonalty alone, it was held ill. † *Tit. Variance* 1.

The next is 20 *Ed.* 4. 6. but that is nothing to the Purpoſe; for it was thus: *ff.* If a Recovery be had againſt the Bailiffs and Commonalty of *W.* and before Execution the Name of the Corporation is changed, yet the Plaintiff may take out Execution.

Marks verſus *Maryot.*

Tempeſt. Trin. 8 W. III. Rot. 343.

Surrey, ff. DEBT upon Bond, dated the 2d of July, 7 W. III. conditioned for Performance of an Award.

The Defendant pleaded, No Award made, &c.

The Plaintiff replied, and ſhewed an Award; in which, amongſt other Things, it was awarded, that the Parties ſhould ſign mutual Releaſes to each other of all Demands, until the 15th Day of Auguſt following, which was after the Date of the Submiſſion; and upon Demurrer it was objected,

That the whole Award was void, becauſe the Arbitrators had exceeded their Authority; for they were only to arbitrate all Matters till the Date of the Bond, which was the 2d of July; and they had awarded Releaſes of all Demands till the 15th of Auguſt following, which they had not Power to do.

But admitting the Award as to the Releaſes to be void, yet it doth not follow that the reſt of the Award ſhould be ſo; becauſe it may be void for one Party, and good for another. Cro. Eliz. 809. Moor 885. Hob. 191.

Then

Then it was objected, That 'tis not averred that the Award was ready to be delivered to the Parties; and that is one Part of the Condition of the Bond.

But this Objection was not allowed; because after the Award is made, 'tis always ready to be delivered. 3 Mod. 230.

Strike versus *Bensly*.

Winford. Trin. 5 W. & M. Rot. 1802.

Norwich, ff. DEBT upon Bond, for Performance of an Award, to be made on or before such a Day: And if not made at that Time, then to perform the Award of an Umpire.

The Defendant pleaded in Bar, That the Arbitrators made no Award; but that the Umpire ordered that all Suits should cease, and that the Defendant should pay six Pounds, and give a General Release to the Plaintiff: Then he avers, That he had not prosecuted any Action, &c. and that he paid the six Pounds, which the Plaintiff accepted in full Discharge of the Money awarded; and that he was ready to execute a General Release, &c. et hoc parat' est verificare, &c.

The Plaintiff replied and confessed, That the Arbitrators did not make any Award, but that the Umpire awarded as the Defendant had alledged in his Plea; and further, That after the Payment of the Six Pounds, the Plaintiff should seal a general Release to the Defendant; and then he avers, That the Defendant had paid the six Pounds; and traversed, That the Umpire did award only what the Defendant had set forth in his Plea, & hoc paratus est verificare, unde petit judicium: And upon Demurrer,

The Serjeant tells us, this was strenuously argued on both Sides; and first it was objected against the Replication, That the Plaintiff had not assigned a sufficient Breach of the Award; for the Defendant in his Plea had set forth an Award made by the Umpire, and that he ordered six Pounds to be paid to the Plaintiff, which he averred that he had paid, and which the Plaintiff in his Replication denied; and therefore he ought to have concluded to the Country.

This is admirably well argued, and the Reader is obliged to the Serjeant for his Learning in Logick, as well as in Law, who could derive this Conclusion from such Premisses, *viz.* The Plaintiff had not assigned a sufficient Breach of the Award, *ergo* he ought to take Issue, and conclude to the Country.

He cites one Case, where it was held that the Breach must be set forth in the Replication; and another Case, where it must not.

As to the first, he is mistaken in the Book; for 'tis not in 2 *Saund.* but in the first Part, *fol.* 102: It was Debt on a Bond conditioned to give

give an Account of Goods, and to make an equal Dividend of the Money.

The Defendant pleaded, That neither Goods or Money came to his Hands.

The Plaintiff replied, That a Silver Bowl came to his Poſſeſſion, *& hoc paratus eſt verificare*; and upon Demurrer, that Replication was held to be ill, becauſe the Plaintiff had not ſet forth any Breach of the Condition as he ought: 'Tis true, he averred that a Silver Bowl came to his Hands, but that is not ſufficient; for he ought to ſet forth in the Negative, that he had not made a Dividend; and if no Breach is alledged, the Plaintiff can have no Cauſe of Action.

Telv. 78. In the next Place he tells us where the Breach muſt not be ſet forth in the Replication: *ſſ.* It was Debt on a Bond for Performance of Covenants, in a Leaſe made by Husband and Wife, who was Tenant in Tail; in which there is a Covenant, that the Leſſors might enter to view the Reparations.

The Defendant pleaded, That the *Iſſue in Tail* entered before any Covenant was broken.

The Plaintiff replied, That the Iſſue in Tail came with him on the Land to view the Reparations, and traverſed that he entered *modo & forma, &c.* He had a Verdict, and upon a Writ of Error brought, it was objected, That the Plaintiff had not aſſigned any Breach in his Replication: And it was held he ought not, becauſe the Defendant had offered a Special Iſſue in his Plea, *viz.* That the Iſſue in Tail entered, *&c.* which obliged the Plaintiff to make a Special Replication to it.

But it was ſaid in that Caſe, That in Debt upon Bond for Performance of an Award, and *nullum arbitrium* pleaded, the Plaintiff in his Replication muſt aſſign a Breach, becauſe that is not a Special, but a General Plea; but if the Defendant had pleaded a Releaſe after the Award made, that being a Special Plea, the Plaintiff muſt anſwer it in his Replication; and need not aſſign any Breach.

It was admitted that the Replication was ill, becauſe it did not conclude to the Country; but then an Exception was taken to the Bar, viz. The Award was, That the Defendant ſhould ſeal a Releaſe, &c. and he alledges, That ſemper paratus fuit to ſeal it; which is not ſufficient, becauſe he ought to aver that he had done it, and that he had tendered it to the Plaintiff; which he is bound to do.

Now, tho' the Replication is not good, yet the Defendant having committed the firſt Fault by his Plea, the Plaintiff muſt have the Advantage of it; and this was the Opinion of the Chief Juſtice Treby; but 'tis not very clearly reported, for I think the Paragraph is inſenſible: 'Tis thus,

ſſ. The Bar is impertinent, for it doth not appear that the Umpire had any Authority to make an Award; and 'tis all one as if he had ſaid that the Arbitrators had not made any Award before the Submiſſion, or that a mere Stranger had not made any Award,

I think it will be very difficult for any Man to make Senſe of that Paragraph; and after all the ſtrenuous arguing on both Sides, the Caſe was brought to nothing; for Juſtice *Powel* was not of the ſame Opinion with the Chief Juſtice: For he held, that tho' it is true that Judgment ſhall be generally given againſt him who made the firſt Fault, yet it was not ſo in the Caſe of an Award; but why, he doth not tell us.

That Judge was of Opinion, That if the Defendant will lead the Plaintiff out of the common Road, he muſt follow him; as if he plead non ſubmiſit, or any other collateral Matter, he muſt anſwer it without aſſigning any Breach; but if he goeth on in the common Way, and pleads the General Plea, viz. Nullum arbitrium, **or that which amounts to it; there the Breach muſt be aſſigned in the Replication.**

The Serjeant tells us what that Judge ſaid relating to this Plea, *viz.* That it amounted to a Plea of no Award made; but certainly this muſt be a Miſtake; for inſtead of no Award, the Defendant pleads an Award made; and ſhews the Performance.

The other Judges did not ſpeak to it; ſo the Plaintiff had Leave to diſcontinue.

And now the Serjeant bids us look into *Linſey* and *Aſhton*'s Caſe, which he tells us is a notable Caſe, both as to the Traverſe and the other Points above-mentioned; and I think he is miſtaken in that too; for there is not a Word in that Caſe whether the Breach ſhould be aſſigned in the Replication or not, or whether it ſhould conclude to the Country; nor that the Defendant (who in that Caſe was likewiſe to ſeal a Releaſe) ſhould plead that he had actually done it, or that *paratus fuit* to do it.

'Tis reported in ſeveral Books; and 'tis thus:

Iſſ. It was Debt upon Bond for Performance of an Award, *&c.* 1 *Rol. Rep.* 5. 6. 2 *Bulſt.* 38. 1 *Godb.* 255. *idem.*

The Defendant pleaded, That the Submiſſion was of all Actions *depending between them*; and the Arbitrators awarded that he ſhould releaſe *all Suits* unto the Plaintiff, which he averred he had done; and did not ſay *paratus fuit* to do it.

The Plaintiff replied, That true it is, *quod tale fecerunt arbitrium*; but that the Arbitrators did further award the Defendant ſhould pay unto him 15 *l.* on ſuch a Day, at the Houſe of *J. S.* a Stranger, which he had not paid; *abſque hoc*, that they made an Award *ſolummodo*, as the Defendant had alledged in his Plea.

There was an ill Rejoinder; to which there was a Demurrer.

It was objected, That this Plea and the Award was naught; for the Submiſſion was of *all Suits depending*, *&c.* and the Arbitrators awarded a Releaſe of *all Suits generally*, which Releaſe is not good: and if ſo, the Award is likewiſe void for the 15 *l.* But the Court held, that tho' it was void in Part, yet that did not make the whole void.

Then it was objected that the Replication was ill, becauſe of the Traverſe; for he traverſed that the Arbitrators made ſuch an Award *only*, as the Defendant had ſet forth in his Plea; when in Truth the Defendant did not alledge that they made ſuch an Award only: And

'tis certainly true, that a Thing which is not expreſly alledged cannot be traverſed.

But it was adjudged that this Traverſe was good; for when the Defendant had pleaded that the Award was, That he ſhould releaſe all Suits; that ſhall be intended to be the whole Award: But when the Plaintiff replies, and ſhews that the Arbitrators awarded more, he might traverſe that which was alledged by the Defendant; and that after ſuch a Traverſe, nothing further can be rejoined; therefore he ſhould conclude to the Country.

This is our Serjeant's notable Caſe; but whether pertinent to all the Points in the principal Caſe, I muſt leave the Reader to determine.

Onyons verſus *Cheeſe*.

Tempeſt, Trin. 10 W. III. Rot. 1582.

Stafford. ſſ. DEBT upon Bond for Performance of an Award of all Actions, Suits, &c. between the Parties, ſo as it be made in Writing before ſuch a Day; and if not, then to ſtand to the Award of an Umpire, &c.

The Defendant pleaded, That neither the Arbitrators or the Umpire made any Award.

The Plaintiff replied, and confeſſed that the Arbitrators made no Award, but that the Umpire being choſen, awarded that all Suits between the Parties, or any others upon their Accounts, ſhould ceaſe, and that the Defendant ſhould pay 5 l. to the Plaintiff, towards his Coſts at Law; and aſſigns the Breach in not paying that 5 l. And upon Demurrer, it was objected that this Award was void;

1. Becauſe it was, That all Suits ſhould ceaſe between others who had not ſubmitted themſelves, &c. and the 5 l. being to be paid in Conſideration of the ceaſing of ſuch Suits, the Defendant cannot have the full Benefit of the Award, becauſe thoſe who were not Parties to the Submiſſion may ſtill proſecute their Suits againſt him; and therefore the Award being void as to this Part, is void for the whole.

As to this Matter, I find this Diſtinction made, which my Lord Chief Juſtice *Saunders* calls a very good one, *viz.* That where the Satisfaction intended and awarded to one, is made any Part of the Conſideration of his paying Money, or doing any Act to the other; and if by the Award it ſelf he hath no Poſſibility of having or recovering that Satisfaction by Law, there the Award being void as to that Part, is void in the whole; and the other Perſon ſhall take no Benefit by it.

But where a Man is awarded to do two Things, and one of them is void, there the Award ſhall not ſtand good for the other; as for Inſtance,

ſſ. An Action on the Caſe was brought for Work done. 2 *Saund.* 292.

The Defendant pleaded an Award, by which he was to pay unto the Plaintiff what was due to him for Task-work and Days-Work, and that the Plaintiff ſhould pay to the Defendant 25 *l.* and upon Payment of the Money, the Parties ſhould ſign general and mutual Releaſes; and then avers that the whole came to 12 *l.* 10 *s.* and no more; which he had paid.

It was agreed on all Hands that Part of this Award was void for the Incertainty, *viz.* how much ſhould be paid for the Work; and therefore it was held that the other Part of the Award for the Payment of 25 *l.* was in like Manner void, becauſe it plainly appeared that the Arbitrators intended ſomething ſhould be paid for the Work, which being void for the Reaſon above-mentioned, the whole Award muſt be void; for otherwiſe the 25 *l.* would be paid, and the Plaintiff have no Manner of Satisfaction for the Work which he had done; becauſe after the Money was paid, the Plaintiff was to give a General Releaſe, and then it was impoſſible for him to have any Satisfaction for his Work; which was never intended by the Arbitrators.

'Tis true, if a Man is awarded to pay 10 *l.* to *A.* and 5 *l.* to *B.* who is a mere Stranger to the Submiſſion, the Award is void as to the Stranger, but yet it ſhall be good for the Payment to the other; becauſe it appears plainly by the Award that 10 *l.* and no more, was intended for him; and he can have no Manner of Prejudice if the 5 *l.* ſhould be never paid to the other.

2. It was objected, That where a Submiſſion is conditional, viz. with an ita quod the Award be made de Præmiſſis; in ſuch Caſe it muſt be made of the whole, and final: Now tho' theſe Words de Præmiſſis were omitted in this Bond, yet it was ſtill conditional, for it was ita quod it be made before ſuch a Day; and therefore the Award ought to be final; which it was not, becauſe it was only made of Part, viz. That the Defendant ſhould pay 5 l. towards the Plaintiff's Charges at Law; ſo that he is at Liberty to proceed againſt him for the reſt.

But this Objection was not allowed; for Payment towards Charges, in common Underſtanding, is taken for Payment of the whole.

Boſwall verſus *Rawſtorne.*

Trin. 5 W. & M.

York, ſſ. DEBT by the Husband, as Adminiſtrator of his Wife, for 553 l. ſetting forth an Indenture made between the

the Parties, &c. by which Teſtatum exiſtit that the Defendant covenanted to pay Mary Rawſtorne, the Sum of 200 l. within three Months after her Marriage, and 200 l. more within two Years afterwards, if ſhe ſhould be then living; with Intereſt after the Rate of Six per Cent. until the ſaid principal Sums ſhould become due: That this Deed was dated 27 December, 1664. And that the Plaintiff married the ſaid Mary on the 16th Day of May, 1700. and that ſhe lived five Years afterwards; That the Principal and Intereſt of the ſaid 400 l. from the Time of the Date of the ſaid Indenture, till the Principal became payable, amounted to 553 l. viz. the Intereſt of 200 l. from the Date of the Indenture to three Months after the Marriage, to 63 l. (which is a Miſtake, for it comes to 67 l. 13 s. 4 d.) and the Intereſt of the other 200 l. from the Date, &c. to two Years after the Marriage, came to 87 l. (which is likewiſe a Miſtake, for it comes to 88 l. 13 s. 4 d.) and which he had not paid, and that the Adminiſtration of the Goods of Mary, was granted to the Plaintiff by the Archbiſhop of Canterbury, apud caſtrum Eborum, &c. The Defendant pleaded non eſt factum, and thereupon they were at Iſſue, and the Plaintiff had a Verdict, and it was moved in Arreſt of Judgment,

1. That the Action was brought for 553 l. when the true Debt was 556 l. and the Plaintiff doth not ſhew how the reſt was diſcharged.

* *The true Debt is* 556 l. 6 s. 8 d. *for the Intereſt of* 200 l. *for five Years, ſeven Months and twenty Days, is* 67 l. 13 s. 4 d. *and the Intereſt for the other* 200 l. *for ſeven Years, four Months and twenty Days, is* 88 l. 13 s. 4 d.

But this being only a Miſtake of the Clerk in caſting up the Sums (for Lawyers are ſeldom good Arithmeticians), 'tis amendable, eſpecially after a Verdict: And ſo is 2 Cro. 569. which was an Action on the Caſe, on a Promiſe to pay Money for ſeveral Wares, amounting in toto to 82 l. 8 s. when in Truth it was 82 l. 18 s. and ſo 10 s. was demanded leſs than what was due.

As to this Matter, where the Plaintiff lays ſeveral Promiſes in his Declaration to pay Money, *&c.* and in caſting up the whole, demands more than the particular Sums will amount unto, 'tis reaſonable that the Defendant ſhould object againſt it; but where he demands *leſs*, if 'tis a Fault, I ſhould think the Defendant might eaſily excuſe it; however, the Serjeant adds a *Quære* to it upon the Authority of a Caſe in 2 *Cro.* 478. which he miſtakes for 498. 'tis *Pemberton* verſus *Shelton*; and it was Debt for not ſetting out Tithes, whereof the ſingle Value was 11 *l.* 8 *d.* and the treble Value came to 33 *l.* 2 *s.* but the Action was brought for 33 *l.* and ſo for *leſs* than was due.

If the Serjeant had turned to the Caſe, there could have been no Occaſion for this *Quære*; for the true Diſtinction was there made, *viz.* Where the Action is grounded on a Specialty, the Plaintiff muſt not demand *leſs* than is due; becauſe the Sum is not only certain, but the Contract is entire; but where the Demand is not of any certain Sum, but conſiſts only in Damages, which are never reduced to a Certainty till recovered, there, if he varies from the firſt Valuation, 'tis not material.

2 *Cro.* 529.

To

To the ſame Purpoſe is the Caſe in *Cro. Car.* 103. It was a Grant of a Rent-Charge of 10 *l. per Annum*, and 20 *s. nomine pœnæ*, for every Month after it was due and not paid; and becauſe in the Replevin the Defendant avowed for 50 *l.* only *nomine pœnæ*, when by his own Shewing there was 200 *l.* due for 200 Months, therefore the Avowry was held ill; for he ſhould have ſhewed how the other 150 *l.* was ſatisfied, this being upon a Deed where the Sum was certain, and the Contract entire.

So is *Baily* and *Hugh*'s Caſe, which he calls *Baily* and *Offord*'s Caſe; but in this the Serjeant follows Juſtice *Ventris*, who cites the ſame Caſe by that Name; but the Miſtake of the Name is pardonable, where the Law it ſelf is not miſtaken, which very often happens when the Name of the Caſe is wrong; becauſe it may be preſumed, that where the Name is miſtaken the Writer never look'd into the Caſe. *Cro. Car.* 137.

'Tis true, in 2 *Vent.* 129. there was a Leaſe made reſerving Rent of 10 *l. per Annum*, payable *Quarterly*; the Leaſe was dated 25 *March*, 4 *Jac.* and the Plaintiff declared, That the Leſſee entered, and was poſſeſſed till *Chriſtmas* following; and brought this Action but for *one Quarter*, when upon his own Shewing there was Half a Year and more due: And upon Demurrer to this Declaration the Plaintiff had Judgment; but it was becauſe this was not like the Caſes above-mentioned, for every Quarter's Rent is a ſeveral Debt, for which diſtinct Actions may be brought, and ſo not like an Action of Debt brought for Part of the Money due on an entire Contract.

2. Then it was objected, That the Plaintiff had declared by a Teſtatum exiſtit, which is never allowed in an Action of Debt, tho' 'tis in Covenant.

To which it was anſwered, That there is a Difference where Debt is brought on a Covenant to pay Money, and upon a Demiſe reſerving Rent; for in the firſt of thoſe Caſes, 'tis good by way of Teſtatum exiſtit, but not in the other. 2 *Lev.* 75.

3. The laſt Objection was, That the Plaintiff had ſet forth, That Adminiſtration was granted to him by the Archbiſhop of Canterbury, *apud caſtrum Eboru*; which is a judicial Act, and ſo being out of his Province it was void.

But it was held, That the granting Adminiſtration was but a Miniſterial Act, becauſe the Ordinary is directed to do it by the Statute.

And to prove this *Helegar*'s Caſe was cited, 1 *Jones* 234. but there is no ſuch Caſe in that Page or Book.

Wilson versus *Conſtable.*

Winford. Trin. 10 W. III. Rot. 1235.

York ff. DEBT upon Bond for Performance of an Award, ita quod it be made by the Arbitrators, &c. if not then, ita quod it be made de præmiſſis by the Umpire, either in Writing or by Word of Mouth before two Witneſſes.

Upon nullum arbitrium pleaded, The Plaintiff replied and ſhewed an Award made by the Umpire ore tenus; but did not aver that it was made before two Witneſſes: And upon Demurrer to this Replication it was held ill; becauſe the Submiſſion being conditional, the Plaintiff had not ſhewed that the Award was made according to the Condition.

Cooper versus *Hirſt.*

Cooke. Paſ. 12 W. III. Rot. 1626.

Nottingham ff. DEBT upon Bond for Performance of an Award; Upon nullum arbitrium pleaded, the Plaintiff replied and ſet forth the Award, which was, That the Defendant ſhould pay the Plaintiff 12 l. before ſuch a Day, and that within a Week afterwards he ſhould fetch his Mare and Colt from him; And upon Demurrer it was objected,

That this was an Award of one Side only, becauſe by the Award it ſelf it appeared, That the Plaintiff had the Poſſeſſion of the Mare and Colt at that very Time, which ſhall not be intended a wrongful Poſſeſſion; for he might have them either by the Delivery of the Defendant, or might take them Damage-Feſant; and if ſo, then the Award is not mutual, for the Plaintiff is not awarded to do any Thing: But this was contrary to the Opinion of Juſtice Blencow.

Elliot verſus *Chevall.*

Winford. Trin. 11 W. III. Rot. 1920.

London ff. DEBT upon Bond for Performance of an Award, ita quod it be made by the Arbitrators de præmiſſis, ready to deliver to the Parties, on or before the 20th of May, &c.

&c. and if not made before the 21st Day of May, then to ſtand to the Award of an Umpire.

The Defendant pleaded nullum arbitrium made by the Arbitrators, but that the Umpire being choſen on the 20th of May awarded, That the Defendant ſhould pay unto the Plaintiff, 40 l. before the 11th of June following; and ſo pleaded Performance.

The Plaintiff replied, and ſet forth the Award in hæc verba, in which amongſt other Things it was recited, That there had been conſiderable Dealings between the ſaid Parties; and that the Plaintiff having duly paid unto the Defendant all his juſt Demands, there remained due to the ſaid Plaintiff 40 l. which the Umpire ordered the Defendant to pay, &c. which he had not done; And upon Demurrer it was objected,

1. That the Award was void, becauſe it was of one Side only, viz. for the Defendant to pay 40 l.

But the Anſwer was, That it reciting Dealings between the Parties, and that the Plaintiff had paid all which was due to the Defendant; and then ordering him to pay 40 l. to the Plaintiff, this muſt be intended in Satisfaction of the Debt due from the Defendant to him.

2. That the chuſing an Umpire on the 20th of May was wrong, becauſe the Power of the Arbitrators was not determined till the Day after, viz. 21 Maii, for they might have made their Award after the Umpire was choſen.

But this Objection was not allowed, becauſe the Arbitrators having made no Award, that which was made by the Umpire muſt be good; and for this you may peruſe the Authorities in the Margent, which are ſo. Cro. Car. 263. 1 Roll. Abr. 262. Nº. 5.

As to this Matter, there is a Diſtinction made in a late Report, between an *Umpire appointed by the Parties themſelves* within the Time the Arbitrators were to make their Award, and between *an Umpire choſen by the Arbitrators* within that Time; for in the firſt Caſe ſuch a Bond of Submiſſion is void, becauſe the Arbitrators and the Umpire have both a concurrent Juriſdiction at the ſame Time, and that by the very Appointment *of the Parties themſelves* in the Condition of the Bond; but where the Umpire is choſen by the Arbitrators within the Time limited for them to make the Award, 'tis otherwiſe; becauſe by their chuſing an Umpire, they have waived the Submiſſion made to themſelves: And this ſeems to be a very reaſonable Diſtinction, and to be a better Anſwer to the ſecond Objection above-mentioned. 2 Jones 167. 2 Mod. 169. 2 Saund. 133. 1 *Lev.* 285, 302.

Lee versus *Elkyn.*

Cooke. Trin. 13 W. III. Rot. 1802.

Northampton ss. DEBT upon Bond for Performance of an Award, dated 28 November 12 W. 3.

Upon nullum arbitrium pleaded, the Plaintiff replied, and set forth an Award made 31 January following, by which amongst other Things the Defendant was ordered to pay the Plaintiff 11 l. upon or before the 7th Day of May next ensuing; and that upon Payment thereof, the Plaintiff should give the Defendant a general Release of all Actions unto or upon the said 28th Day of November, and assigns the Breach, that he had not paid the Money secundum formam arbitrii.

And upon Demurrer to this Replication it was objected, That the Breach was not well assigned; for it was, That the Money was not paid secundum formam & effectum arbitrii, when it should be pursuant to the Words of the Award, viz. That it was not paid upon or before the 7th of May; That the Defendant might take a single Issue either upon the one or the other.

Dyer 243. *B.* was cited in Proof of this Matter; it was Debt upon Bond for Performance of an Award, so as it be made and delivered to the Parties, *at or before* the 22d of *July*.

The Defendant pleaded, That the Arbitrators did not deliver any Award to the Parties *before* that Day.

My Lord *Dyer* makes a *Nota* upon this Plea, That it was wrong, for it should be in the Disjunctive according to the Condition, *viz.* That they did not deliver it *at or before*; and this, the Serjeant says, is an Authority in Point, when 'tis only the single Opinion of one Judge.

And it seems it was an Opinion which did not prevail with the Court in the principal Case, for they held, That the Breach was well assigned in Substance, by alledging, That the Defendant had not paid the Money secundum formam & effectum arbitrii; but all agreed, That it would have been better if it had been assigned pursuant to the Words of the Award.

1 Lev. 144. 2 Mod. 269. *contra.*

Agreeable to this is a Judgment in the Case of Watnough and Holgate; it was upon an Award to pay the Plaintiff 15 l. at or before the first of December; and the Breach assigned was, That he had not paid it upon that Day; and upon Demurrer it was held ill, because he might pay it before.

3 Lev. 293.

As to the Release in this Case the Court was of Opinion, That if the Plaintiff had executed it, the Bond of Submission had been discharged; for that was dated on the 28th of November, and the Plaintiff was awarded to release all Actions unto or *upon* that Day.

I cannot but take Notice, that the Serjeant informs us, There were several other Exceptions taken to this Award, and that particular Answers were given to it, which he would not report; be-

cause he was afraid of making his Book too long: But this is a Reason not very agreeable to the Book it self, nor to his Promise which he made at the end of the very first Case, to avoid impertinent Prolixities; if this had been observed, he must have pared off a great deal from those two mighty Excrescencies of the Law, and after all, there would scarce enough be left to fill *Homer's* Nutshell.

Cockson versus *Ogle.*

Cook. Trin. 13 W. III. Rot. 1559.

Newcastle upon Tyne, ss. DEBT upon Bond for Performance of an Award, of all Differences between the Parties, *ita quod* it be made de præmissis, &c. and if not, then to stand to the Award of an Umpire, &c.

Upon nullum arbitrium or Umpirage pleaded, the Plaintiff replied, and set forth an Award made by the Umpire; by which amongst other Things the Defendant was ordered to pay to the Plaintiff 12 l. 15 s. at or upon the second Day of February, and to deliver some Goods particularly named, and three Boxes and several Books; and that the Plaintiff should deliver other Goods to the Defendant particularly named; and that if any of the Goods should be lost, then the Value should be paid as appraised by the Arbitrators and Umpire; and that the Parties should seal general Releases to each other; (but did not say when) then he assigns the Breach, That the Defendant had not paid the Money secundum formam Umpiragii præd'.

Upon Demurrer to this Replication it was agreed, 1. That where the Submission is conditional, (as it was in this Case) there the Award must be final as to all Matters contained in the Submission, and that if any Thing is left undetermined, the whole Award is void.

This is very true, for if the Submission be of all Controversies, *ita quod* it be made *de præmissis*, the Award must be made of * all Controversies of which they had Notice, or 'tis void; but if the Submission is of all Controversies generally, without adding that conditional Clause, there, though there are some Matters between the Parties, which the Arbitrators did know and not determine, yet their Award will be good for that which they did arbitrate; and this was my Lord *Coke's* Opinion in 2 *Cro.* 200. 354. and 'tis a Distinction which is allowed to be Law.

* *Hob.* 49.

There is a Case cited for this purpose in 4 *Leon.* 49. but that must be a Mistake, for there is not a Line in that Page relating to this Matter.

2. The Award being to deliver several Books, (without naming them) is void, because 'tis incertain what Books were to be delivered; and therefore this being in the Case of a conditional Sub-

mission, the whole is void; and this was allowed by the Court to be a good Exception.

But if the Submission had not been conditional, there, if Part of the Award had been void, it should be good for the rest as well as 'tis in the Case above-mentioned, where the Arbitrators did not determine all Controversies of which they had Notice between the Parties; and so are the Cases in the * Margent.

* 2 *Saund.* 292. *which see in* Onyon's *Case* devant. 2 *Lev.* 3. 3 *Lev.* 413.

S. In neither of which Cases it doth appear, That the Submission was conditional; but it was of all Controversies generally, and one Part of the Award was void, *viz.* It was to pay all the Expences of Suit and other reasonable Charges, which the Plaintiff had laid out, which is altogether uncertain; but yet the Award being likewise to pay 7 l. 10 s. that was certain enough.

There was nothing in that Case awarded to the Defendant, but that general Releases should be given, and that was not to be done 'till he paid all the reasonable Expences which the Plaintiff had sustained, and the 7 *l.* 10 *s.* Therefore it was objected, That it was an Award on one Side; for if the Defendant was not to have a Release till he had paid all the Expences, *&c.* and the Award being void as to that Part of it; then he was never to have any Release: But it was adjudged, That the Payment of the 7 *l.* 10 *s.* being certain, the Release should be given when that was paid.

3. It was held, That there is not any certain Time appointed when these Releases should be executed on both Sides, for the Reason above-mentioned, and therefore neither of them were bound to seal a Release, because it would have been a good Discharge as to the Goods, without any Satisfaction for them.

There was another Question made, *viz.* Whether the Umpirage was not void, because the Goods were to be valued by the Arbitrators and Umpire? Now the Arbitrators being to give their Judgment before the Umpire, and that not being done, their Power was determined, so that if afterwards they intermeddle to value the Goods, 'tis a judicial and not a ministerial Act, and that would make the Award void.

There were two Judges against one, That the Umpirage might be void for that Reason, but they all agreed, That it was void as to the Delivery of the said Books, &c.

Certainly the Valuation of the Goods must be a judicial Act, because it depends merely upon the Judgment of the Arbitrators.

There are some Cases to this Purpose, *viz.* That if Arbitrators reserve to themselves any * Act of Judicature, after the Time when the Award is made, 'tis void, because 'tis not final at that Time; and amongst the rest, the Case of † *Grove* and *Crane*, which proves the contrary, is reported in several Books, and it was cited on both Sides in the principal Case.

* 2 *Cro.* 314.

† *Palm* 145. 2 *Cro.* 584. 2 *Rol. Rep.* 214. idem.

S. The Award was for the Defendant to pay Money to the Plaintiff at three Payments, and if before the last Day of Payment (which was long after the Submission) it should appear to the Arbitrators, That the Defendant was bound for the Plaintiff *in any Debt not satisfied*, he should repay the Defendant *as much* as that amounted

to:

to: Now here was ſomething reſerved by the Arbitrator for his future Judgment, but that did not make the Award void; but the Uncertainty of the *Debts not paid*; for if the Award had been thus, *ſſ.* If it appear that the Defendant is bound in 20 *l.* for the Plaintiff, and not ſatisfied, then he ſhall pay 20 *l.* though 'tis reſerved to his future Judgment, yet the Award is good, becauſe the Sum is certain.

All the other were Caſes of miniſterial Acts, as to give a general Releaſe, *as Counſel to another ſhould adviſe.* *Style* 217.

To pay all Coſts which *ſhould be taxed by a Prænotary.* *Sid.* 358.

But now to conclude this good Caſe, as the Serjeant calls it, he adviſed his Reader to look into *Lee* and *Elkyn*'s Caſe, as to what concerns the firſt Point, and to obſerve the Difference between them.

Now the firſt Point in this Caſe was not controverted; for it was agreed on all Sides, That if a Submiſſion of all Controverſies is conditional, with an *ita quod* it be made *de præmiſſis*; there, if the Award is not final, 'tis void.

Now there was no ſuch Point in the Caſe of *Lee* and *Elkyn*, nor any Thing like it; for the Point in that Caſe was thus. *ff.* An Award was made to pay Money *upon or before* ſuch a Day, and in this Caſe it was to pay Money *at or upon* ſuch a Day, which is all the Difference that I can find between the Caſes; for the Breaches were aſſigned alike in both, *viz.* That the Money was not paid *ſecundum formam arbitrii*; Now though it might not be well aſſigned in the firſt Caſe, where the *Diſjunctive* related to different Days, becauſe a ſingle Iſſue could not be taken upon a Breach ſo generally aſſigned; yet that could be no Objection in the other Caſe, where the *Diſjunctive* ſtill related to the ſame Day.

Gatland & Ux' verſus *Chatfield.*

Tempeſt. Mich. 11 W. III. Rot. 348.

London ſſ. DEBT upon Bond made to the Wife dum ſola; the Condition was, That the Defendant ſhould pay to her 10 *l.* yearly ſo long as he and ſhe ſhould live together, according to the Purport of certain Articles made between them, &c.

The Defendant pleaded in Bar, That the Plaintiff's Wife and he did not live together; And upon Demurrer the Plaintiff had Judgment, but after two Arguments,

The Queſtion was, Whether theſe Words (ſhould live together) ſhall be taken as living together in the ſame Houſe, or living together at the ſame Time?

One would think this could not be a Queſtion which ſhould take up two Arguments in the Debate; for certainly 'tis more agreeable

to Reason, common Honesty and Understanding, That the Payment should be during their *Ajoint Lives*, and not whilst the Defendant, who was a Parson, should live in the *same House* with another Man's Wife.

Lambard versus *Kingsford.*

Tempest Mich. 11 W. III. Rot. 341 London.

DEBT upon Bond for Performance of an Award of all Controversies between the Parties, which the Arbitrators shall make and publish in Writing, under their Hands and Seals, &c.

Upon nullum arbitrium pleaded, the Plaintiff replied, That the Arbitrators ceperunt upon themselves to award de præmissis, per scriptum suum indentat. (leaving out the Copulative &) under their Seals, (leaving out their Hands) They awarded the Defendant to pay 66 l. to the Plaintiff at Sennock aforesaid, and Sennock was not named before; then he avers, That the Award was ready to be delivered to the Parties under their Hands and Seals, &c. and assigns the Breach for not paying the Money secundum formam & effectum arbitrii: And upon Demurrer;

It was objected to this Replication, That the Submission being to stand to an Award, to be published under the Hands and Seals of the Arbitrators; there was no such Award set forth, for it was alledged to be under their Seals only.

But this Exception was not allowed, because in the latter Part of the Replication, 'tis said, That the Award was ready to be delivered under the Hands and Seals of the Arbitrators, &c.

2 *Cro.* 278. But certainly had it not been for those last Words, the Replication had been naught, because the Parties had agreed in what Form the Award should be made, *viz.* under the Hands and Seals of the Arbitrators.

As to this Matter there are some very nice Distinctions made by the Lawyers. *ff.* If the Condition is to stand to an Award so as 'tis *Signed and Sealed*, and the Award set forth is, That it was *Sealed*;

1 *Rol. Abr.* 245. N°. 25. this was held good, because Sealing is Signing in Law, but not *e converso.*

Palm. 97. Now if the Words had been, *Signed under their Hands*, it hath been ruled, That they ought actually to subscribe their Names.

Palm. 109. But if the Word (*signed*) had been left out, and the Condition had been, *ita quod* it be made under their Hands and Seals, as it was in the principal Case, even in such Case, *Mountague* and *Doderidge* held, That *Sealing* was sufficient, because it was essential to a Deed, and *Signing* was but a late Act; but Justice *Haughton* was of another Opinion, That they ought to put their Names to it; and according to

to his Opinion, that Judgment was reverſed in the Exchequer-Chamber; but they all agreed, That if the Condition had been to ſtand to an Award, &c. to be *ſubſcribed under their Hands and Seals*, there they muſt write their Names, and *Sealing* alone had made the Award void.

But certainly, when a Deed is affirmed to be *ſigned and ſealed*, ſomething more is intended than *Sealing* only; and to ſay, 'tis *ſigned under Hand*, is only a Circumlocution, for the Word *Signed* imports the reſt; neither can I ſee how the Word *Subſcribed* enforces this Matter; for if I ſay, That ſuch a Deed was made or *given under my Hand and Seal*, it ſignifies as much as if I ſhould ſay, it was *ſubſcribed* under my Hand and Seal.

2. It was objected, That the Copulative &, being left out, it did not appear that the Award was made in due Time; but the Anſwer was, That the Word Arbitratores is a Subſtantive which governs all the Verbs in that Sentence.

3. There was another Objection, That it was ſaid prædict' Sennock, when Sennock was not mentioned before; but that Word being void and idle of it ſelf, ſhall not make the Award void. 3 Bulſt. 198.

The Plaintiff had Judgment, which was affirmed in Error in B. R.

The Mayor, &c. of Bedford verſus *Fox.*

Hill. 9 W. III. Rot. 1784. C. B.

Bedford ſſ. DEBT upon Breach of a By Law, brought by the Mayor, Bailiffs, Burgeſſes and Commonalty of Bedford, ſetting forth, That the Town was incorporated by that Name; and that there was a Cuſtom for the Mayor, Bailiffs and Commonalty, to make By-Laws, &c. That on the 16th of Sept. 7 W. 3. it was ordered in the Council-Chamber of the Corporation, by John Peck, then Mayor, and by ſeveral Aldermen, Burgeſſes, Bailiffs, Chamberlains and Common-Council-Men, naming them all, That no Perſon, who was not a Freeman of that Corporation, ſhould ſet up a Trade there, under the Penalty of 5 s. per Day, to be paid to the Chamberlains for the Uſe of the Town; and if not paid, then to be levied by Diſtreſs, by a Warrant under the Town-Seal, or to be recovered in an Action of Debt, to be brought by the Mayor, &c. That this Law was duly publiſhed, and that the Defendant not being a Freeman, did ſet up the Trade of a Tanner in that Corporation, and uſed it twenty eight Days, by Reaſon whereof he had forfeited 7 l. per quod actio accrevit, &c.

And upon Demurrer to this Declaration it was objected, That there was a material Variance in the Name of the Corporation; for the Action was brought by the Mayor, Bailiffs, Burgeſſes and Commonalty;

monalty; and the Custom to make By-Laws, is alledg'd to be in the Mayor, Bailiffs and Commonalty, leaving out Burgesses.

2. Besides, this Custom is not strictly pursued, because the By-Law was made by particular Persons by Name, when it ought to be made by the Mayor, Bailiffs and Commonalty; for so is the Custom as set forth in this Declaration.

3. This By-Law is against Law, because it excludes all those who had served Apprenticeships in the Corporation; and for this Reason the Defendant had Judgment.

Co. 11. *Rep.* 53. *Godb.* 252. idem. *Hob.* 210.

The Cases cited to maintain this Judgment, were in my Lord *Coke* and *Hobart*'s Reports; The first was the Tailors of *Ipswich* Case, who brought an Action of Debt on a By-Law, That no Person should use a Trade there, or take an Apprentice, till he was presented to the Master and Wardens, and should prove that he had served seven Years as an Apprentice to the Trade; nor then neither, unless he should be admitted by them to be a good Workman.

This was held a void Law, because when a Man has served an Apprenticeship, he may lawfully set up his Trade, without being admitted by any Society of Men to be a good Workman; and this Distinction was then taken, *viz.* That a By-Law made for the *Government* of Men in their Trades is good, but not to *restrain* them; and to this Purpose the Year-Book 2 *H.* 5. 5. *B.* was cited, where *Hull*, who was then a Judge of the Common Pleas, swore by God, That a Bond given not to use a Trade, was against Law, and that he would commit the Man who made it; and it seems that he was in earnest, because he bound it with an Oath.

* *Hob.* 210.

The next Case is in * *Hob.* *ff.* The Queen incorporated the Fellowship of Weavers in *Newbury*, and gave them Power to make By-Laws, and it was ordered in the Grant, That none should exercise the Trade of Weaving in *Newbury*, except he was admitted to it by the Wardens and Society of that Trade; That they made a By-Law, That no Person should use that Trade, except he had been an Apprentice to it *in that Town*, and had used it there for five Years *before* the Law made, or was admitted by the Wardens: Now because this excluded all Apprentices brought up in the Town after the Law was made, therefore it was held void, and so is the Clause in those Letters Patents, *viz.* That no Man should exercise the Trade of a Weaver there, except he was admitted to it by the Wardens, *&c.* because it restrains Men of their Liberty, and is against Law for that very Reason, unless it is confirmed by Act of Parliament: Now if the Queen, by her immediate Power, cannot make such a Law, certainly no other Power derived from her can do it.

By restraining Men of their Liberty is meant that Liberty which every Man had at Common Law, to set up one or more Trades where he pleased, though he was not bound Apprentice to any; which if he performed, either falsly or unskilfully, he was punishable for it.

Now a By-Law being an Order which puts a further Restraint upon Men than the Common Law did, or the publick Laws of the Kingdom now do, therefore it is very reasonable that it should be made for the common Good and Benefit of all those who live in that particular

particular Place where 'tis made; but reſtraining Men from uſing Trades, cannot be for the common good; and therefore ſuch By-Laws have always been condemned.

But a Cuſtom of the ſame Nature with ſuch a By-Law hath been held good: As for Inſtance, if there is a Cuſtom alledged in a Borough, that no ſtrange Artificer, who is not free of that Place, ſhall uſe any Art or Myſtery within the ſame; this is good; becauſe 'tis *lex loci*; and by Conſequence a By-Law grounded upon ſuch a Cuſtom is good, tho' 'tis a Reſtraint of the Liberty of the People; but ſuch a By-Law not warranted by a particular Cuſtom, but *generally* upon a Cuſtom to make By-Laws, had been void.

Chaloner verſus *Davis.*

Hill. 9 W. III. Rot. 1175.

Buckingham, ſs. DEBT upon Articles of Agreement, wherein the Plaintiff covenanted to ſeal and execute a good Conveyance of certain Lands, &c. to the Uſe of the Defendant and his Heirs, at or before the 17th Day of November, &c. and the Defendant agreed, in Conſideration thereof, to pay the Plaintiff or his Aſſigns 503 l. at the Houſe of Sir *Francis Child*, tempore executionis of ſuch Conveyance; then he ſets forth, that each of them obliged themſelves in the Penalty of 1001. for the true Performance of this Agreement; and that he and Robert Markham, who was poſſeſſed of a Term for Years, of and in the Premiſſes, joined together, and made, ſealed and delivered a Leaſe and Releaſe, &c. to the Uſe of the Defendant, upon the 17th Day of November, of which he had Notice; but did not accept the Conveyance, nor pay the Money, ſecundum formam & effectum Articulorum præd'.

Upon Demurrer to this Declaration it was objected, 1. That the Plaintiff ought to execute the Conveyance before the Defendant was obliged to pay the 503 l. becauſe where no certain Day is appointed to pay it, there it muſt be reduced to a Certainty by the Act of the Plaintiff himſelf, that is, by executing the Conveyance.

Now if he had not ſufficiently ſet forth that he did execute ſuch Conveyance, then his Declaration muſt be ill; and that he had not done, for he declared that Markham and himſelf had leaſed to the Defendant for a Year; which, tho' true in Fact, yet 'tis not true in Operation of Law, becauſe the Leaſe of Markham, who was Tenant in Poſſeſſion of the Lands, &c. muſt enure as a Surrender of all his Intereſt to the Plaintiff, who had the Reverſion: And if ſo, the Leaſe granted to the Defendant muſt be the Leaſe of the Plaintiff alone; for Markham could not make an Under-Leaſe to any one within the Statute of Uſes, ſo as to give the Leſſee Poſ-

ſeſſion,

ſeſſion, in order to make him capable of a Releaſe of the Reverſion; therefore this muſt be the Leaſe of the Plaintiff alone, and ought to be ſo pleaded; but on the contrary, 'tis pleaded as the Leaſe of Markham and the Plaintiff.

2 *Saund.* 96, 97. 'Tis true, that Pleadings are to be ordered according to the Rules of Law; and therefore, if one Joint-tenant pleads a *Grant* from his Companion, 'tis naught, becauſe 'tis an improper Conveyance to paſs ſuch an Eſtate; it ought to be by Releaſe.

Noy. 66. But where a Reverſion is conveyed by Bargain and Sale, or by a Releaſe, this muſt be pleaded by Way of *Grant*, becauſe that is a Conveyance proper to that Eſtate.

1 *Mod.* 14. A Licence to enjoy a Houſe from ſuch a Time till ſuch a Day, amounts to a Leaſe; and muſt be pleaded as ſuch.

2 *Vent.* 260. So a *Grant* of a Rent-charge from Father to Son, in Conſideration of natural Affection, and likewiſe for Money, was pleaded without Attornment, or Enrolment; and it was held ill, becauſe it ought to be pleaded by Way of Covenant to ſtand ſeized; for ſo it operates by Law.

It muſt be admitted that by theſe Articles there is neither a certain Day appointed for Payment of the Money, nor for executing the Conveyance, for that was to be at or before the 17th Day of November; and certainly if he had executed it before that Day, he would have been intitled to an Action for the Money; which ſhews that the Duty accrews immediately upon the Execution of the Conveyance.

But admitting a certain Day had been appointed for making it, then the Objection would have been a little more colourable, viz. That the Clauſe to pay the Money *tempore executionis* of the Conveyance ſhould refer to that Day; and ſo, whether the Deed was then executed or not, the Money ſhould be paid on that Day.

But even in that Caſe the Law had ſtill been the ſame, becauſe the Payment of the Money muſt neceſſarily relate to the Execution of the Deed it ſelf, and not to the very Day in which it was appointed to be executed.

Some Book-Caſes were cited, to prove that the Plaintiff ought to do the firſt Act, to intitle himſelf to this Action.

Cro. Eliz. 888. 2 *Mod.* 33. *Ff.* The Plaintiff promiſed to pay Money on a certain Day and Place, and the Defendant promiſed *upon Payment* thereof to ſurrender, *&c.* And the Plaintiff alledged, That at the Time and Place he tendered the Money, and that the Defendant did not ſurrender: Now if he had only *promiſed to ſurrender*, in Conſideration the other had *promiſed to pay*, this had been mutual, and each Party might have mutual Actions for Non-performance; but a Promiſe to ſurrender *upon Payment* of Money, makes it a quite different Caſe; for there the *Payment* muſt precede, or elſe there muſt be a Tender and Refuſal.

'Tis true, in that Caſe the Plaintiff pleaded a Tender, but not a Refuſal; and it was adjudged againſt him after a Verdict.

So

So where one covenanted to transfer 400 l. in Bank-Stock, and the other covenanted to accept it, and that *at the Time of transferring, &c.* he would pay the Money; he must first transfer, before the Money will become due.

There were some other Cases cited on the other Side, to prove that the Payment of the Money had no Dependence upon the Execution of the Deed.

ff. 3 *Cro.* 625. If he means *Cro. Car.* which is commonly called 3 *Cro.* there are not so many Pages in that Book; if *Cro. Eliz.* there is nothing to this Purpose in that Page.

Then the Case of *Pordage* and *Cole* was cited, which was an Agreement that the Defendant should give the Plaintiff 500 *l. for* all his Land, *&c.* The Plaintiff brought an Action for the Money, and did not aver that he had conveyed, or tendered a Conveyance of the Land; and it was held he need not; and in that Case this Distinction was made: *ff.* Where there are mutual Covenants in one and the same Writing, (as there were in that Case) there the Parties may have mutual Remedies; and an Action may be brought by one for the Money, without averring that he had executed the Conveyance; but 'tis otherwise where Men express their Agreements in several Deeds, for then the Covenants in each Deed are the Words of the Party signing it. 1 *Saund.* 320. 321.

So in 2 *Saund.* 250, which he mistakes for 350. It was the Case of *Opie* and *Peters*; and it was an Action on a Promise about building a House. 2 *Saund.* 350.

ff. The Plaintiff was to build it, and the Defendant was to pay him 81 *l. pro labore*: 'Tis true, in this Case he must aver that he had built the House, or was hindered, because the Agreement to pay the Money was executory; and there the Word *pro* makes the Condition to be precedent.

But where the Agreement was, That the Plaintiff should not use the Trade of a Taylor, *&c.* and *in Consideration thereof* the Defendant covenanted to pay him 100 *l. per Annum*, during Life, there the Words *in Consideration thereof*, (that is, in Consideration of the Performance of the Plaintiff's Covenant) do not make it a Condition precedent; so as if the Plaintiff should break it, he should never have his 100 *l. per Annum*: But the Reason was, because the Plaintiff could not in his Life-time aver a compleat Performance of his Covenant, for it was in the Negative; which can never properly be said to be performed 'till 'tis become impossible to break it, which the Plaintiff might have done at any Time whilst living; so that this Covenant could never be performed till he was dead.

For the Reasons above-mentioned, the Declaration in the principal Case was held ill; but there were some other Exceptions to it, of which not much Notice was taken.

ff. By the Articles, the Plaintiff was to seal a good Conveyance; and the Declaration was, That he had sealed and delivered it, &c. to the Use of the Defendant: Now this was not a sufficient Averment of his Performance, because he might deliver it

to one who would not deliver it over to the Defendant; and he could not compel the Delivery to him, because the Plaintiff had not named the Person to whom he delivered it.

Nov. 18. As where *A.* promiſed to pay Money, in Conſideration the other would ſeal and *deliver* a Releaſe to *S.* the Plaintiff averred that he made the Releaſe, and *delivered* it to *B.* for the Uſe of *S.* It was held that this was not a Performance of the Conſideration.

There is a Caſe cited between *Beaſe* and *Draiton* in 4 *Leon.* *Caſe* 148; but it muſt be a Miſtake, for there is no ſuch Caſe in that Book; and the * next Caſe cited is nothing to the Purpoſe: *ſſ.* It was a Grant of Reverſion pleaded, and did not ſhew that it was by Deed or Fine; for a Reverſion muſt paſs by one of thoſe Ways.

* *Cro. Car.* 143.

3. **There was another Objection, ſſ. That the Covenant was to pay 503 l. to the Plaintiff or his Aſſigns; and the Declaration was, That the Defendant had not paid it to the Plaintiff: Now if he had paid it to his Aſſigns, he had perfoxmed his Covenant.**

To prove this, *Cro. Eliz.* 348 was cited: *ſſ.* A Covenant that he, his *Executors and Aſſigns*, would repair; and the Breach was, That he, his *Executors and Aſſigns*, did not repair: This was held ill, becauſe it ſhould be in the Disjunctive. *ſſ.* That neither he nor his Aſſigns had repaired: But this Caſe was denied to be Law, *Mich.* 7 *W. III.* between *Smith* and *Sharp*; for the Breach may be aſſigned as the Covenant is penned.

The next Caſe proves that the Payment to one is ſufficient, where more are named; which is quite contrary to what it was cited to prove: *ſſ.* A Man became bound to pay Money *to two at the ſame Time*; it was held that Payment to *one* was ſufficient, becauſe it was impoſſible to pay the ſame Sum to ſeveral Perſons at the ſame Time, which is very true; but 'tis not an Anſwer to the Objection in the principal Caſe, for there the Payment was to be made to two in the Disjunctive; and from an Averment that it was not paid to one, it cannot be interred that it was not paid to the other.

2 *Sid.* 41.

4. **It was objected, That the Defendant was to pay the Money in the Houſe of Sir Francis Child, at the Execution of the Conveyance; and the Declaration was, That he had not paid it ſecundum formam Articulorum: Now there being a Time and Place appointed for the Payment, &c. the Pleading ſhould be purſuant to the Agreement: ſſ. That it was not paid at the Time and Place alledged, and not ſecundum formam Articulorum; which is by Way of Argument, and not direct.**

1 Lev. 145. 3 Lev. 293. *antea.* 2 Mod. 269.

The Caſes above-mentioned in the Margent prove this Exception to be good; but that in *Cro. Eliz.* 281, which was alſo cited for the ſame Purpoſe, proves the direct contrary: *ſſ.* It was Debt upon Bond conditioned for Payment of Money at two *ſeveral Days*, and at a *certain Place*: The Defendant pleaded Payment of the whole Sum, *ſecundum formam Conditionis*; and this was held good; for *reddendo ſingula ſingulis*, 'tis the ſame Thing as if he pleaded Payment at ſeveral Days, and at the Place.

And

And ſo is *Cro. Car.* 560; which was alſo Debt on a Bond conditioned, That the Obligor, at the Requeſt of the Plaintiff, ſhould *accept* a Leaſe of ſuch Lands, and ſeal a Counterpart; he pleaded *non requiſivit:* The Plaintiff replied, That a Leaſe was drawn *ſecundum formam Conditionis*: And this was held a good Replication, tho' he did not ſay that the Lands in the Leaſe were the ſame with thoſe in the Condition of the Bond.

I have been the longer in this Caſe, becauſe 'tis not only reported in a confuſed Manner, which I have endeavoured to make intelligible, but becauſe there are many Authorities cited in it, which I have carefully examined, and placed them under the proper Objections and Paragraphs to which they relate, they being jumbled together in an indigeſted Manner in the Book it ſelf; and ſome are miſtaken, and others not pertinent to the Subject for which they were cited.

Lynch and *Templeman* verſus *Clemence.*

Mich. 11 W. III. Rot. 364. C. B.

Midd. ſſ. THE Defendant Clemence became bound to Elizabeth Templeman in a Bond of 200 l. in Truſt for the Plaintiff Francis Templeman; and the ſaid Elizabeth afterward married the other Plaintiff Lynch.

Then Clemence became bound to Lynch and Francis Templeman in a Bond of 300 l. that Lynch alone and the Defendant Clemence ſhould ſtand to the Award of Arbitrators, &c. to determine all Differences between them, or either of them.

An Action of Debt was brought upon this laſt Bond by Lynch and Francis Templeman for Non-performance of the Award, and upon nullum arbitrium pleaded,

The Plaintiffs replied, and ſhewed an Award, which amongſt other Things was, That the Defendant ſhould pay to the Plaintiff Francis Templeman 83 l. &c. and that upon Payment thereof Lynch ſhould execute a General Releaſe.

The Defendant rejoins that Francis Templeman was no Party to the Submiſſion, being not ſo much as named in the Condition of the Bond; and upon Demurrer to this Rejoinder it was objected, ſſ. That when Lynch married Elizabeth Templeman, who was Truſtee for Francis, then he himſelf, in the Right of his Wife, became the Truſtee; and he and the ceſtui que truſt, both joining in taking the Bond of Submiſſion, ſhews their Agreement that the Matters in Controverſy ſhould be determined by the Arbitrators, they are in Law but as one Perſon; and if the Money had been awarded to be paid by Lynch, a Tender and Refuſal by the ceſtui que truſt had been a good Plea to an Action of Debt brought by the Truſtee;

Truſtee; therefore the Money awarded to be paid to Francis ſhall not be conſtrued as if had been to be paid to a Stranger to the Submiſſion; for if it had been appointed to be paid to Lynch as aforeſaid, it had been in Equity a Payment to Francis; becauſe the Money due on the Bond taken in the Name of Elizabeth, was in Equity his Money, and Lynch was become his Truſtee by the Marriage; ſo 'tis the ſame in Effect as if the Money had been awarded to be paid to him.

Beſides, the Words of the Condition do ſtrongly imply that Francis Templeman ſubmitted himſelf; for 'tis to ſtand to the Award of Arbitrators to determine all Matters between them, or either of them, which Words would be impertinent if there were not two Perſons in one Part.

Now to prove that tho' the Money was awarded to be paid to *Templeman*, yet not as a Stranger to the Submiſſion, this Caſe was cited: *ſſ.* Two Perſons became bound to ſtand to the Award of *S.* concerning a Matter which did ariſe on the Part of the Wife of one of them before he married her; and the Arbitrator made an Award, that the Money ſhould be paid to the Husband and *Wife*: Now tho' he was no Party to the Submiſſion, and the Money was ordered to be paid to her, yet it was held good, becauſe the Controverſy was occaſioned upon her Account; and ſo the Award was within the Submiſſion.

March. 77.

If a Court of Equity would compel the Execution of an Award, then this is good.

17 Ed. 4. 5. B.

Now ſuppoſe that before the Statute of Uſes an Award had been made, that the ceſtui que uſe ſhould procure his Feoffee to execute a Releaſe to a Perſon in Poſſeſſion of his Land, this would have been a good Award; and if he had refuſed, he might be compelled in Equity to do it.

1 Mod. 9.

So where there are three Perſons, viz. A. B. C. and B. undertakes to pay a Debt to C. and then A. and B. ſubmit to an Award; which was, That A. ſhould diſcharge B. from what he had thus undertaken: Now tho' C. was no Party to the Submiſſion, yet the Award was good; becauſe when the Debt is paid to C. be it when it will, he may be compelled in a Court of Equity to give a Diſcharge.

Then ſeveral Caſes were cited, and amongſt the reſt 3 *Leon.* 211; but there is nothing there to this Purpoſe.

There was another Objection to the Award: viz. That by awarding a General Releaſe to be given, the Bond of Submiſſion was diſcharged; but this Objection was not allowed, becauſe there being no Time fixed for making the Releaſe, it ſhall be conſtrued to diſcharge all Matters to the Time of the Submiſſion; and ſo the Plaintiff had Judgment.

The

The Duke of Bolton *versus Clarke.*

Cooke. Hill. 9 W. III. Rot. 1884.

York, ff. DEBT upon Bond conditioned, That if one Hamond should accompt and pay to the Duke, or his Dyer, all Rents which he, or any by his Dyer shall receive, and shall use his best Endeavour to levy by Distress the Arrears of Rent, and also within two Months after every Year, during his colleating the said Rents, shall give a true Account thereof in Writing to the said Duke, &c. that then, &c.

The Defendant pleaded Performance generally.

The Plaintiff replied, That he had received 7000 l. which he had not paid to the Duke or his Dyer.

The Defendant rejoined, That bene & verum est, that Hamond had received 500 l. and no more, and that he gave a true Account thereof to the Plaintiff; 301. being the Ballance of the said Account; and upon Demurrer, these Exceptions were taken to this Pleading.

1. To the Bar, because the Condition being partly in the Disjunctive, the Defendant cannot plead Performance generally.

So is *Cro. Car.* 421. where the Case was, ff. Debt on Bond for Performance of Covenants, one whereof was to pay 34 *l. per Annum* at the four most usual Feasts, *or* within ten Days after: The Defendant could not plead Performance *secundum formam Indenturæ*, because the Payment of the Rent refers to several Times, it being reserved in the Disjunctive; and the Defendant to answer at which of the Times he paid it, otherwise the Plaintiff could make no Manner of Reply. 2 *Cro.* 560. *and not* 550. *Cro. Car.* 421. *Cro. Eliz.* 232. 1 *Leon.* 311. *idem.*

Then it was objected to the Rejoinder, ff. That the Defendant ought not to say quod bene & verum est, that Hamond received 500 l. and no more, when 'tis positively affirmed in the Replication that he received 7000 l. Therefore he ought to give a positive Answer to it, viz. That he had received 500 l. and given a true Account thereof; and then traversed that he received 7000 l. or more than the 500 l. And the Court was of this Opinion.

Langdon versus *Wallis.*

Cooke. Hill. 9 W. III. Rot. 632.

Wiltshire, ff. DEBT against an Executrix of a Sheriff; and upon non detinet pleaded, the Jury found a Special Verdict: ff. That the Plaintiff Langdon, as Executor of one Hill, obtained a Judgment against John Whittington for 280 l. 11 s. 10 d. Debt and Damages; and upon a Ca. Sa. directed to

Henry Wallis, Sheriff of Wilts, and Husband to the Defendant, Whittington was arrested, and being in Cuſtody, he aſſigned a Mortgage to the Under-Sheriff, in order to ſecure the Payment of the Debt, and he was thereupon ſet at Liberty; that Wallis the High-Sheriff was diſcharged from his Office; and afterwards Whittington paid the Money to the Under-Sheriff, who re-aſſigned the Mortgage to him.

The Queſtion was, Whether an Action of Debt would lie againſt the Executrix of the Sheriff? And it was held that it would not; becauſe Debt muſt be founded upon ſome Contract, and here was none: 'Tis true, an Action of Debt will lie upon an Eſcape; and there is no Contract between the Creditor and the Gaoler; but that is not an Action at Common Law, but 'tis given by the Statute of R. 2.

Now here could be no Contract, nor ſo much as quaſi ex contracto, becauſe the Sheriff had no Authority to diſcharge the Priſoner upon taking ſuch Security; he could not return it as an Excuſe for not having the Body at the Day: And if the Plaintiff in the original Action, had brought an Action of Debt for an Eſcape before Whittington had paid the Money to the Under-Sheriff, the Action would have lain, and the Sheriff could not plead the Aſſignment of the Mortgage in Bar to it.

So if Whittington had been retaken after he was at large, he could have no Remedy by an Audita querela; and if ſo, his being diſcharged by the Sheriff is a plain Eſcape, for which the Plaintiff might have that Action, but not an Action for Debt for the Money.

Cro. Eliz. 400. In Cro. Eliz. it was the Opinion of two Judges, That when a Man is taken in Execution by a Ca. Sa. the Sheriff cannot diſcharge the Priſoner, tho' he pay the Debt to him, becauſe that would be to exceed the Authority which he hath by the Writ, which is to take the Body, and not the Money;

'Tis true, Gawdy and Clench were of a contrary Opinion; but for what Reaſon it doth not appear.

They could not ground their Opinion upon the Year-Book, 13 *H.* 7. 16. for there is nothing there relating to this Purpoſe.

'Tis true, that Year-Book is mentioned in Juſtice *Croke*, as if theſe Judges had relied on it as an Authority for them; and ſo is 21 *H.* 7. 23. But it ſeems they were miſtaken in both; and ſo is the Serjeant himſelf in the laſt of thoſe Caſes; for he tells us, he hath looked into that * Year-Book, and cannot find any Thing there tending to this Matter; *cujus contrarium verum eſt*: For 'tis ſaid there, That if a Man is taken in Execution upon a *Capias ad ſatisfaciendum*, the Sheriff hath no Power to diſcharge him; for he is commanded by the Writ *quod habeat corpus* of the Defendant, to ſatisfy the Debt, (which I take to be this very Caſe); but 'tis there further ſaid, that upon a *Fieri facias* 'tis otherwiſe, becauſe by that Writ he is commanded *quod habeat denarios in curia.*

* *Viz.* 21. *H.* 7. 23.

That Caſe in *Croke* above-mentioned was in the Common Pleas, and in a *Wiltſhire* Cauſe as this is; and *Popham*, who was then Chief Juſtice, followed the Opinion of *Danby*, who was his Predeceſſor in that Court above 130 Years; for in 33 *H.* 6. *fol.* 48. he was of

of Opinion, that by the Words *ad ſatisfaciendum* in the Writ, Payment of the Money to the Plaintiff himſelf muſt be intended; and if not paid to him, then the Body of the Priſoner muſt remain in Cuſtody till he hath ſatisfied the Debt. Hob. 206.

This Execution differs from a Fi. fa. for in the latter the Sheriff hath Authority to levy the Money; and as ſoon as that is paid to the Sheriff, the Defendant is diſcharged; and the Action is transferred from him, and againſt the Sheriff.

But 'tis not ſo upon a Ca. Sa. for the Reaſon before given; and therefore, at that very Inſtant in which Whittington was diſcharged, the Plaintiff might have an Action of an Eſcape againſt the Sheriff; but he can never have Debt upon the Contract, neither can this Caſe be reſembled to that of an Executor taking Bond for a Debt due to his Teſtator: 'Tis true, ſuch a Bond is a Satisfaction, and by Conſequence a Diſcharge of the original Debt; but it doth not from thence follow, that the Aſſignment of the Mortgage in the principal Caſe ſhould be ſo; becauſe an Executor, quatenus ſuch, hath an Intereſt in the Debt due to his Teſtator, and might diſcharge it without any real Satisfaction; but the Sheriff hath no Manner of Intereſt in this Debt, nor Authority to take this Security.

There were many Books cited, to prove that the Law requires Sheriffs ſtrictly to obſerve the King's Writs: As to inſtance in ſome.

If. He cannot detain Goods to his own Uſe, levied by Vertue of a Fi. fa. tho' he pay the Debt out of his own Money, becauſe by the Writ he is commanded to levy it de bonis & catallis of the Defendant; which muſt be by Sale and not otherwiſe. Noy. 107.

Neither can he deliver the Goods themſelves to the Plaintiff; for he muſt ſell them. Cro. Eliz. 504.

The Serjeant hath cited 2 *Vent.* 93. but upon Peruſal of that Caſe, I find it was adjudged upon another Reaſon: It was an Action of Treſpaſs brought againſt one *Sampſon* and a *Bailiff*, for taking and detaining Cattle *quouſq;* the Plaintiff had paid them 11*l.*

The Defendant *Sampſon* juſtified, that what he did was by Vertue of a *Fi. fa.* on a Judgment, which he had obtained againſt the Plaintiff, and that the Bailiff, *ut ejus ſervien'*, did take and detain the Cattle *quouſq;* he paid the Money to the Bailiff, *for the Uſe of the Sheriff:* And upon Demurrer, this Plea was held ill, becauſe it did not anſwer the Declaration; for that was for detaining, *&c.* till the Money was paid to *Sampſon* and the Bailiff; and they juſtified the Detaining, till it was paid to the Bailiff.

'Tis true, there was another Exception, *viz.* 'Tis ſaid the Money was paid to the Bailiff *for the Uſe of the Sheriff*, which ought to be to *the Uſe of the Plaintiff*; for if 'tis to the proper and peculiar Uſe of the Sheriff, then he had not purſued his Writ, for by that he is commanded to levy the Money *& quod habeat denarios, &c. ad reddendum* to the Plaintiff; but this ſeemed to be a ſtrained Conſtruction of the Plea, for it muſt be intended to the *Special Uſe* of the Sheriff, that

that he may have the Money ready in Court, as the Writ commands.

Cro. Eliz. 208. On the other Side it was inſiſted, That after a Fi. fa. is iſſued, and before 'tis retorned, the Defendant may pay the Money to the Sheriff; and if before the Return made he is out of his Office, and the new Sheriff returns that he received the Writ endorſed fieri feci, &c. but had not the Money in Court, the Defendant is diſcharged by this Payment, and the Plaintiff muſt take his Remedy againſt the old Sheriff.

In *Trinity Term*, 3 *Jac.* 1. there was a Queſtion debated in *B. R.* that if a Sheriff levies Goods to the Value of the Debt, and pays Part to the Creditor, and before he retorned the Writ, and after he was out of his Office, whether he could ſell the reſt?

2 *Cro.* 73. *Moor* 757. 1 *Rol. Abr.* 893. Juſtice *Croke*, Serjeant *Moor*, and my Lord *Rolle*, who all report the ſame Caſe, ſay, that the Sale is good; and their Reaſon was, *viz.* That the Sheriff having ſeiſed the Goods, and not retorned his Writ, he is become chargeable to the Party for the Value, and therefore might ſell them, tho' he is out of his Office; from which it might be inferred, that Payment to the Sheriff in the principal Caſe is good, and that by accepting the Mortgage, he is become chargeable to the Plaintiff: 'Tis true, the Caſe is ſo reported by thoſe Authors; but Juſtice *Yelverton* reports it quite contrary, *viz.* That ſuch Sale is not good, becauſe the Authority of the Sheriff is determined; and he ought to turn over the Goods to the new Sheriff; for by the bare Seiſure, the Property of the Goods is not alter'd, but it remains in the Owner till Sale; for a Seizure is not an Execution; 'tis the Beginning of it, and no more; and he ought to retorn his Writ executed *in tanto:* And of this Opinion were two Judges in the principal Caſe, and denied that Report in *Croke* to be Law; and yet by a Seizure the Sheriff hath ſuch a Property in the Goods, that he may bring Trover for taking them out of his Poſſeſſion.

Yelv. 44.

2 *Saund.* 47.

So that theſe Caſes do not decide one Way or the other; neither doth that Opinion in 2 *Mod.* 214. much prevail: *ſſ.* That if a Man is taken in Execution upon a *Ca. Sa.* he may pay the Money to the Marſhal, in Satisfaction of the Debt; for it was but the ſingle Opinion of one Judge: And the Book tells us, that *alii* were of a contrary Judgment, becauſe the Perſon who paid the Money may have a Remedy to recover it again of the Marſhal; for Payment to him is not a Satisfaction of the Debt.

In the principal Caſe, Judgment was given for the Defendant; chiefly becauſe the diſcharging the Priſoner upon taking the Mortgage was an Eſcape in the Sheriff; and where once ſuch an Action is veſted in the Plaintiff, he ſhall never turn it into an Action of Debt; becauſe one ariſes *ex maleficio*, and the other *ex contractu*; which are widely different in their very Natures, and never to be reconciled without an Act of Parliament; and that is the Reaſon why an Action of Debt lies upon an Eſcape.

I think it may not be improper in this Place to give the Reader a ſhort Account of theſe Executions.

ſſ. The

ſſ. The uſual Executions at Common Law were, either by *Levari facias*, which was to levy the Debt *de terris & catallis*, or by *fi. fa.* and that was to levy it *de bonis & catallis*.

But the Perſon of the Debtor was for ever free, except in Caſes of Force, and ſo were his Lands: Now the Law principally regarding the publick Peace, it was thought reaſonable from the very Beginning and Eſtabliſhment of this Nation, That thoſe who broke the Peace ſhould be committed to Priſon; and therefore a *Capias* iſſued to take ſuch Perſons; and becauſe in ſuch Caſes a *Capias* was allowed in Proceſs, it ſeemed neceſſary that a *Capias ad ſatisfaciendum* ſhould be allowed after Judgment.

In thoſe Days there was very little or no Trade here, but the People were chiefly employed in Wars and in Tillage; and this might be the Reaſon why their Bodies were not liable to Impriſonment, becauſe then they became uſeleſs and a Burthen to the Land; for they could neither be uſeful to the King in his Armies, nor to the Publick in Tilling the Ground.

As Trade increaſed, and the great Men of the Land came to live in a more luxurious manner, ſo they had often occaſion to call upon the Receivers of their Money to ſupply this way of Living; and thoſe Men knowing that their Perſons were free from Impriſonment, and having no Lands themſelves, did live upon the Money which they had received for their Lords; and for this Reaſon the Parliament might think it proper to ſubject their Bodies to Impriſonment; for by the Statute 13 *Ed.* 1. *cap.* 11. a *Capias* was given in an Action of Accompt againſt ſuch Perſons; and 'tis probable, that becauſe they might have purchaſed ſome Lands with their Lords Money, therefore in the ſame * Year an *Elegit* was given to take Lands in Execution; for though the old Writ of *Levari facias* did command the Sheriff to levy the Debt *de terris & catallis*, yet that was generally underſtood to be of the Profits of the Lands in the Owner's *Poſſeſſion*, for the Creditor could not enter and turn him out. *Weſtm.* 2. *cap.* 11. * *Weſtm.* 2. *cap.* 18.

And even when Lands became liable to be taken in Execution for a Debt, the Parliament had ſtill regard to Tillage; for the Sheriff was only to take *medietatem ternæ*, the reſt was left for the Support of the Man and his Family, which he had liberty to manure for that Purpoſe; and therefore in the very *Elegit* it ſelf, though it took the Goods and Chattels, and half the Land, yet *Bobus & affris carucæ* were excepted.

So that at Common Law a *Capias* did not lie but in Treſpaſſes *vi & armis*; it was afterwards introduced in Actions of *Accompt*, by the Statute of *W.* 2. and above ſixty Years after, it was allowed for a Debt or Damages, by the Statute 25 *Ed.* 3. *cap.* 17. and ſo the Law ſtands at this Day.

Keating versus *Irish.*

Cooke. Pas. 9 W. III. Rot. 366.

York ff. DEBT upon Bond conditioned, That the Defendant should give the Plaintiff Notice of all Declarations or other Proceedings which should be delivered to him for Recovery of the Lands; and should pay his Rent, and not attorn Tenant to any other Person without the Consent of the Plaintiff.

The Defendant pleaded, That he was Tenant at Will to the Plaintiff, and that half a Year's Rent was due, which he was ready to pay upon the Premisses, but that there was not any Body to receive it; and that afterwards obtulit se to pay the Money to the Plaintiff, which he refused to receive; and that before any more Rent was due, he entered and determined his Will; and then pleads That he did not attorn Tenant to any one fine alienu of the Plaintiff, and general Performance as to the rest.

Upon a Special Demurrer to this Plea it was objected, 1. That the Defendant ought to have set forth, That there was not any Declaration delivered to him, or that such were delivered of which he gave the Plaintiff Notice; and therefore to plead Performance generally was ill.

41 *Ed.* 3. 10. *B.* The Year-Book 41 *Ed.* 3. was cited to prove that this was rightly objected, but it doth not come up to the Point: It was an Action of Debt upon a Bond, with a Condition indorsed (as the Manner then was) for Performance of Agreements between the Parties: 'Tis true, Serjeant *Chilrey* pleaded Performance generally, but no Notice was taken of the Plea, for the Case was adjudged upon another Point, which was thus, *ff.* The Plaintiff would have the Condition to be void, because there was no Seal to the Indorsement; and the Defendant having pleaded Conditions performed, he would have that to be a good Confession of the Bond and Duty; and so the Objection ought to stand single; but the Court held the Indorsement was good.

2 *R.* 3. 17 *a.* 22 *Ed.* 4. 15. *a.* 1 *Inst.* 303. *B. Cro. Eliz.* 749. *Moor* 856. 2 *Saun.* 411. The other Books in the Margent were cited to the same purpose, but 6 *H.* 7. 17. *a.* is a Mistake, for there are not so many Pages in that Year, and in *Cro. Eliz.* 307. there is nothing relating to this Matter.

Keilway 95 *B.* is cited under another Objection to the Plea, *viz.* to prove, That the Defendant setting forth that he did not attorn without the Consent of the Plaintiff, was a Negative pregnant, when in truth it wholly relates to the first Objection; and because there are some nice Distinctions in it, I shall be a little more particular in relating the Case: It was Debt upon Bond for Performance of * Covenants in an Indenture, *viz.* to repair the Buildings and several other Things, and to pay the Rent at every Day on which it was made payable.

* *An Indenture is not mentioned in the Case, but I suppose it must be so intended.*

Serjeant *John Moore* pleaded Performance generally, and upon Demurrer (as I ſuppoſe to the Plea) upon the firſt Argument, the Court held it to be good; but the Reporter tells us, That being better adviſed, after they had peruſed their Books, they held, That the Defendant ought to have pleaded a Special Performance: 'Tis true, many of the old Books are ſo, but this being found inconvenient, becauſe it made the Rolls very long, therefore they came to a ſhorter way of Pleading, and my Lord *Coke* tells us how long 'tis to be. *ff.* If a Man is bound to perform Covenants in an Indenture, he may plead Performance generally, unleſs ſome are in the Negative, for ſuch cannot be performed; or where ſome are in the Disjunctive; for there you muſt ſhew which you have performed, or if any is to be done on Record, you muſt ſhew it Specially. 1 *Inſt.* 303. *b.*

And according to this Rule the Plea in the principal Caſe was drawn; for moſt of the Clauſes in the Condition were in the Affirmative: 'Tis true, there is one in the Negative, *viz.* That the Defendant ſhould not attorn Tenant to any other Perſon, without the Conſent of the Plaintiff; and as to that he pleaded Specially, That he did not attorn, *&c.*

In former Days it was held, That where the Condition is made up of ſo many Generals, that 'tis very difficult, and almoſt impoſſible to remember them; in ſuch Caſe you may plead Performance generally; as if an Under-Sheriff is bound to ſave the High harmleſs from all Accompts in the Exchequer, and from all Falſe Returns of Writs; there he may plead Performance generally, becauſe 'tis impoſſible for him to remember all; and there according to another Rule laid down by my Lord *Coke*, the particular Matter muſt come on the other Side.

It was likewiſe held, That where the Obligor is bound to perform the Conditions himſelf, he ought to plead Specially, and ſhew how; but this is not generally true, for where he is Party to an Indenture, he is uſually bound to perform the Covenants himſelf, and yet in ſuch Caſe he may plead Performance generally.

Theſe were the Diſtinctions made in *Kellway* above-mentioned; but the Law is now taken according to thoſe Rules laid down by my Lord *Coke*, and therefore the Plea in this Caſe was held good, becauſe the Plea of *Performance generally* avoids Prolixity, and ſtuffing the Rolls with unneceſſary Matters and Things.

2. It was objected, That the Defendant pleading he had not attorned without the Conſent of the Plaintiff, made it a Negative pregnant, and to prove this the aforeſaid Caſe in Kellway was cited, & 2 Cro. 559. where amongſt ſeveral other Covenants, one was, That the Covenantor ſhould not make any Grant of the Lands without the Plaintiff's Aſſent; and as to this Covenant the Defendant pleaded, That he did not grant without the Plaintiff's Aſſent; and this was held a Negative pregnant, and was one Cauſe why that Plea was not good; and to prove it *Coke* bids us look into the Year-Book 14 *Ed.* 3. 5. when there is no Report of any Caſe in that Year, for it breaks off in the 10th, and begins the ſecond Part with the 17th Year of that King.

He

He bids him look into 12 *Ed.* 4. 4 *B.* which was in an Aſſize; the Tenant pleads a Feoffment *by Deed*; the Demandant replied, and made a Title to himſelf, and traverſed the Feoffment made to the Tenant *modo & forma*: Now that was not a direct Anſwer to a Feoffment *by Deed*, yet the Words *modo & forma* were adjudged to refer to the Deed; and all that was ſaid relating to the Matter for which it was cited, was, That if the Demandant had pleaded, That the Tenant had not a Feoffment by Deed, it had been a Negative pregnant, and not ſo good as what he had pleaded, which might be very true; but it doth not from thence follow, that a Negative pregnant is bad; for an Iſſue upon a Negative pregnant is an Iſſue ſtill, and though for that Reaſon 'tis miſjoined, yet 'tis helped after a Verdict by the * Statute.

* 32 *H.* 8.

Then as to the Tender, the Court held, That it was not well pleaded, becauſe the Defendant has not alledged, That he was a convenient Time on the Land before Sun-ſet; but it was held, That this Fault was cured by pleading a Tender to the Plaintiff himſelf, however it was a Fault; for the Defendant ought to plead at the laſt inſtant of Time, becauſe the Perſon hath Liberty to come at that Time.

2 *Cro.* 423. 499.

But the Defendant had Judgment, and none of theſe Exceptions were allowed.

Knipe verſus *Hobart.*

Mich. 10 W. III. Rot. 331. C. B.

DEBT upon Bond made to the Plaintiff as Bailiff of Weſtminſter; the Condition was, That whereas he had levied Goods as belonging to one Cunningham, which were claimed by Whiteman, and thereupon the Plaintiff delivered the Goods to him, if therefore the ſaid Whiteman ſhould recover them, if upon a Trial at Law they ſhould appear to be the Goods of Cunningham, and if he and the Defendant Hobart ſhould indemnifie the Plaintiff for quitting the Poſſeſſion, and for returning nulla bona, then, &c.

The Defendant pleaded non damnificatus.

The Plaintiff replied and ſet forth the whole Proceedings, viz. The Judgment obtained againſt Cunningham, the Goods ſeized, the Claim of Whiteman, and that the Goods were delivered to him, then nulla bona returned, and an Action brought againſt him for this falſe Return, and upon Not guilty pleaded, a Verdict and Judgment againſt him, and ſo was damnified: And upon Demurrer to this Replication,

The Queſtion was, Whether this was a lawful Bond, the Condition being to indemnifie an Officer from making a falſe Return? And the Court held it was a good Bond, and gave Judgment for the Plaintiff.

The Year-Book 2 *H.* 4. was cited to maintain this Judgment, which proves that which is quite contrary. *ff. A.* diſtrained the Cattle of *B.* who brought a Replevin, and the Sheriff retorned *quod non potuit habere viſum averiorum*; and thereupon a *Capias in Withernam* iſſued to take the Cattle of *A.* The Sheriff took four of his Oxen, but re-delivered them to the Owner, upon giving a Bond to indemnifie him, *&c.* And this was held a void Bond, becauſe the Condition was againſt Law; for he ought to have kept the Oxen, and not to deliver them upon taking ſuch Bond. 2 *H.* 4. *fol.* 9.

Juſtice *Markham* in his Argument againſt that Bond, put this Caſe. *ff.* If a Bond is given to a Sheriff, with a Condition to ſave him harmleſs from imbezilling a Writ, which he had to arreſt the Obligor, Whether ſuch Bond is good or not? And held by all that it was a void Bond.

But in later Caſes there hath been a Diſtinction made as to this Matter; for though it was a common Opinion, and did prevail, That where a Condition of a Bond was againſt Law, that Bond it ſelf was void; yet my Lord *Coke* tells us, It muſt be underſtood of a Condition to do a Thing, which is *malum in ſe*; for in many Caſes there may be Conditions to do Acts againſt the Rules of Law, and yet the Bonds are good; as to Inſtance in ſome; *Co. Litt.* 206. *B.*

ff. If the Condition of a Bond is to make a Feoffment to his Wife, this is void, becauſe 'tis againſt Law; but yet the Bond is good, and ſtands ſingle.

A Sheriff being about to levy Goods on a *Fieri facias*, took Bond of the Perſon, though not in his Cuſtody, to pay the Money into Court at the Return of the Writ; and this was held a good Bond, yet it ſeemed to be againſt Law, *viz.* againſt the Statute 23 *H.* 6. by which 'tis enacted, That Sheriffs ſhall diſcharge Perſons arreſted upon Surety *of ſufficient Perſons*, &c. to appear, except Perſons in Execution: The next Clauſe ſhews in what Form this Bond with Sureties muſt be taken, *viz.* It muſt be to the Sheriff by the Name of his Office, and the Condition muſt be to appear at the Return of the Writ; then follow theſe Words, *viz.* If he take an Obligation in other Form by Colour of his Office, 'tis void: Now the taking a Bond to *pay Money into Court* is another Form, and not preſcribed by the Statute; but becauſe it was taken of a Perſon *not in Cuſtody*, the Bond was held good; for the Statute extends to Bonds only made by Perſons *under an Arreſt*. 10 *Rep.* 100 Beaufage's *Caſe*. 23 *H.* 6. *cap.* 10.

'Tis true, if a Sheriff will take Bond to bail a Perſon who is not bailable by Law, the Bond is void; as if the Bond is to ſave him harmleſs from diſcharging a Man in Execution; and this is *Dive* and *Maningham*'s Caſe in the Commentaries.

There was another Objection to the Condition in that Caſe, *viz.* That it was not purſuant to the Statute 23 *H.* 6. which requires the Sheriff to take *Sureties* in the plural Number, and there was but *one* taken; but this was an Objection of very little Weight, for thoſe Words are only directory, and not of any Reſtraint, and therefore 'tis at his Peril if the Defendant doth not appear.

Hob. 14. A Sheriff may likewiſe take Bond, in his own Name, of his Under-Sheriff, to indempnifie him from Eſcapes, and 'tis good, becauſe he hath transferred his Authority to him; and therefore 'tis reaſonable that ſuch Bond ſhould ſtand for his Security, and to bind the other to perform his Office faithfully; and yet this is a Bond taken in another Form than what the Statute directs.

But that which comes neareſt to this very Caſe, is in 1 *Anderſon* 267. where an Officer attached Goods in the County-Court, and delivered them to the Defendant, who gave Bond to appear at a Day, *&c.* or to return the Goods; and this was held a good Bond, and that the Statute extended to Bonds taken of Men in Cuſtody, and not to thoſe given for Delivery of Goods by Perſons when at large.

In 2 *Cro.* 199. there is nothing relating to this Matter; ſo that muſt be a Miſtake; but in the principal Caſe the Bond was held good.

Bellot verſus *Carthwright.*

Cheſter ſſ. DEBT for a Fine upon an Admittance to a Copyhold Eſtate, in which the Plaintiff ſet forth, That he was Lord of the Manor of S. of which one Meſſuage, and certain Lands were Parcel, and uſually granted by Copy of Court-Roll: That one T. F. was ſeiſed thereof in Fee, and ſurrendered it to two Cuſtomary Tenants, to the Uſe of the Defendant and his Heirs, who was admitted at ſuch a Court, &c. by the Steward, and thereupon at the ſame Court he aſſeſſed 10 l. for a Fine, and appointed a Day of Payment, to the Lord of the Manor, which was not paid; then he ſets forth a Demand and a Denial, ad damnum, &c.

It appears that Sir *Edmond Saunders* drew this Declaration, for his Name is to it; but there is no Plea or Demurrer, however, to divert the Reader, there are ſome Caſes which the Serjeant bids him look into, but for what Purpoſe I cannot tell; I am ſure 'tis not to inform him whether an Action of Debt will lie for a Fine upon an
2 *Cro.* 617. Admittance to a Copyhold Eſtate, for the Caſe in 2 *Cro.* is no more than thus, *ſſ.* There was a Difference between the Lord and Tenant about the Fine; the Lord would have it *at Will*, and accordingly aſſeſſed it, and appointed a Day for Payment; the Tenant would have it *certain*, and on that very Day the Fine was aſſeſſed, he tendered to the Lord what he thought to be warranted by the Cuſtom of the Manor; and therefore he did not come on the Day appointed by the Lord to pay it; and the Queſtion was, Whether this was a Forfeiture? And held that it was, but not if he had come on the Day, though he had not paid the Fine: There is not a Word of an Action of Debt throughout the Caſe.

And

And the next Caſe is as little to the purpoſe: It was Treſpaſs brought by a Copyholder againſt his Lord, who pleaded, That he admitted the Plaintiff, and aſſeſſed a Fine, which he appointed to be paid on a certain Day and Place, which not being paid, the Copyhold was forfeited, for which he entered; and upon Demurrer it was objected, That he ſhould have averred the Fine to be reaſonable; but it was not allowed, for it ought to come on the Copyholder's Side to ſhew the Circumſtances, whether the Fine was reaſonable or not, becauſe by Law the Fines are arbitrary, and due to the Lord of common Right; and if they are at any Time unreaſonable, 'tis only to be uſed as an Excuſe by the Tenant to ſave a Forfeiture; but in that Caſe the Lord had not alledged any Demand of the Fine, and therefore it was adjudged againſt him; for there can be no Forfeiture without a Demand of the Fine.

The 13 *Co. fo.* 2. is much to the ſame Purpoſe, ſo that all theſe Caſes relate only to Forfeitures of Copyholds, for not paying Fines upon Admittances, and not one of them to an Action of Debt brought for ſuch a Fine.

There have been ſome Doubts, Whether an Action of Debt would lie for a Fine upon an Admittance to a Copyhold, but 'tis now generally held that it will lie. *Sid.* 58

Anonymus.

ſſ. THE next is ſome Pleading without Name, Term or Number-Roll; there is no Declaration, but a Plea of *Plene adminiſtravit.*

The Plaintiff replied, That he filed a Bill in the Exchequer againſt the Defendant, and had an Attachment for Want of an Anſwer, and averred, That he proſecuted the ſaid Writ in order to compel an Appearance, and ſo to recover his Debt, and that at the Time of the Return of the Subpœna he had Aſſets.

The Defendant rejoined, and confeſſed the Subpœna, and the Filing the Bill and the Attachment, but ſaith, That he had no Notice that the Subpœna was proſecuted, with an Intent that the Plaintiff would exhibit a Bill for recovering the Debt; and ſo ut prius he pleads Plene adminiſtravit die exhibitionis billæ; and Iſſue was taken upon the Notice.

Denton

Denton versus *Evans.*

Winford. Mich. 11 W. III. Rot. 454.

ff. DEBT upon a Judgment. The Defendant pleaded in Abatement, a Writ of Error depending in the Exchequer-Chamber upon this Judgment prout patet per recordum; and concludes his Plea thus, unde petit judicium de breve: And upon Demurrer it was objected to the Matter of this Plea,

ff. Whether a Writ of Error depending, doth not hinder the Plaintiff from proceeding in an Action of Debt upon the Judgment? And it was held it did not, because the Record remains below, and 'tis only a Transcript thereof sent into the Exchequer; and so it hath been * adjudged formerly.

* Sid. 236.

'Tis true, this Action hath obtained ever since the Time of H. 6. and hath been pleaded sometimes in Abatement, and often in retardatione judicii; but the latter Way is now wholly disused, because there could not be a certain Time to re-summon the Defendant if the Judgment should be affirmed.

A Writ of Error depending is a Supersedeas to an Execution upon a Judgment; but it seems 'tis not to an Action of Debt, though there is no Difference in the Reason of the Thing between the one and the other.

'Tis no Supersedeas to an Action of Debt, because the Record is not removed; but 'tis to an Execution, and yet the Record continues in the same Court where the Judgment was obtained.

The Serjeant tells us, that the Court gave Judgment against the Defendant, That he should answer over; and yet in the next Paragraph he saith, That they did not resolve whether the Plea was good or not; this seems to be a plain Contradiction, for if they had not held the Plea to be ill for the Matter, why was Judgment given against the Defendant that he should answer over? And the Serjeant himself seems to be of Opinion, That the Plea was ill in Form, and cites a Case to prove it, *viz. Mich.* 9 *W.* 3. in *C. B.* between *Aldred* and *Havering*, that the Defendant ought not to conclude it with *petit judicium de breve.*

Butterfield versus *Marshall.*

Winford. Hill. 13 W. III. Rot. 1564.

Hertford ff. DEBT upon Bond for Performance of Covenants in a Conveyance of a House, &c. in which there was a Covenant, That the Vendee should have Liberty to draw Water

Water at a Well adjoining to the Houſe; and another Covenant, that the Vendor was ſeized in Fee of the Meſſuage, &c. and that the Purchaſer ſhould enjoy it, free from all Incumbrances; and likewiſe a Covenant for further Aſſurance, either by Fine, Feoffment, Recovery, &c.

The Defendant pleaded Performance generally.

The Plaintiff replied, and aſſigned for Breach, That the Defendant was not ſeized in Fee of the Well, &c. And upon Demurrer,

It was objected to the Form of this Plea, viz. That there being a Covenant for quiet Enjoyment, free from all Incumbrances, the Defendant could not plead Performance generally; but he ought to have ſet forth, That the Houſe was free from Incumbrances at the Time of the Conveyance, and not charged at any Time ſince.

So likewiſe as to the Covenant for further Aſſurance; he ought to have pleaded, That no further Aſſurance was required, or that ſuch an Aſſurance, and no other, which he had executed. *Co. Ent.* 65. *B.* 135. *B.* 147. *B.* 244, 245, 635.

But the Court was of Opinion that the Plea was good in Subſtance, tho' ill in Form; and that it had been better, if it had been pleaded as aforeſaid.

But then it was objected againſt this Replication that the Breach was not well aſſigned; for it was, That the Defendant was not ſeized in Fee of the Well, when in Truth there was not any Covenant that he was ſo ſeized; it was only that the Plaintiff ſhould have Liberty to draw Water there; and the whole Court was of that Opinion; and that it appeared by the Plaintiff's own ſhewing, that he had no Cauſe of Action.

Peele verſus *Evans*.

DEBT brought by the Plaintiff as Adminiſtrator of W. M.

The Defendant pleaded that W. M. was indicted at Hicks's-Hall; and convicted at the Old-Baily for a Burglary, and had Judgment of Death; and averred that the Judgment is ſtill in Force; and that by Reaſon thereof, the Debt was forfeited to the King.

There was no Replication or Demurrer to the Plea, nor any further Proceedings in it.

Rud verſus *Lowen*.

Winford. Hill. 12 W. III. Rot. 367.

Bedford, ſſ. DEBT againſt an Executor; upon a Penal Bill made by his Teſtator for 18*l.* for the Payment of 9*l.* and the Plaintiff declared, that he the Defendant had not paid the Penalty.

Upon Plene Administravit pleaded, the Plaintiff had a Verdict, but could never get Judgment, because he had declared that the Penalty was not paid; it should have been, that the 9l. was not paid.

Treen versus *Hiccox*.

Winford. Mich. 13 W. III. Rot. 574.

Warwick, ss. DEBT upon Bond conditioned for the Payment of 15l. wherein the Plaintiff declared, That the Defendant, &c. at Warwick, concessit se teneri, &c.

The Defendant pleaded the Statute made in 1696: ss. That two Thirds of the Creditors, in Number and Value, might make a Composition with their Debtors, who absconded or were in Prison before the 17th Day of November 1697; that such Composition should be binding, if made without Fraud, for the equal Benefit of all the Creditors, in Proportion to their respective Debts.

Then the Defendant confesses the Debt due to the Plaintiff, and to several other Creditors; (naming them) and avers that he owed no more; and that before the 17th Day of November he absconded; that the * 1st of May 1697. he compounded with the greatest Part of his Creditors in Number and Value, and that they accepted 10 s. in the Pound.

Then he avers, That the Composition was made for the equal Benefit of all the Creditors, and that he had paid it; and that he had given † Notice of the Agreement to the Plaintiff, and tendered the Composition-Money, which she refused to receive; and all this he lays to be apud Rugby in Com. Warwick.

And upon Demurrer to this Plea it was objected,

ss. That it began and concluded in Bar, viz. Actio non, &c. and concluded, &c. petit judicium si, (the Plaintiff) actionem suam præd' (against the Defendant) habere debeat.

That it did not appear in what Year of the King's Reign the Composition was made, but only in Anno Domini 1697.

That the Defendant alledged he did withdraw himself before the 17th Day of November, but not on that Day.

That he should have averred, That the Debts mentioned in the Plea were all he owed at the Time of the Composition.

That it did not appear to be made for the equal Benefit of the Creditors, because some were to have 10s. in the Pound for their principal Debts, including the Interest, and some 10s. for the principal Debt only.

But the Plaintiff had Judgment without any Regard to these Exceptions; for he had laid the venue apud Warwick; and the Defendant had pleaded several Matters in Bar, which he alledged to be done apud Rugby in Com. Warwick; and this he might not to do, because

* Postea, *in the Case of* Royston *ver.* Baston *a Plea on this Statute was held ill, because the Composition was alledged to be* ante exhibitionem Billæ; *it should be* ante impetrationem brevis originalis.

† *For want of pleading Notice and a Tender, the Plea was held ill in* Buxton *and* Nelson's *Case* postea.

cauſe he cannot change the Venue from the Town of Warwick by pleading theſe tranſitory Matters in Bar.

And tho' it was objected that Warwick being in the Margent, and the Venue being laid apud Warwick; that ſhall be intended the County, and not the Town; yet that Objection was not allowed; and ſo the Plaintiff had Judgment.

But there was no Book cited to warrant it: Now as to this Nicety, it hath been obſerved, That all Facts which are iſſuable muſt be tried by Perſons who live neareſt to the Place where thoſe Facts are alledged to be done; and this is upon a Suppoſition in Law that the Neighbours have a better and more certain Knowledge of the Thing which they are to try; and therefore the Plaintiff muſt declare that it was done either in a Town, Pariſh, Hamlet, or *Lieu conus*, out of the Town: And my Lord *Coke* tells us, 'tis a very neceſſary Point to know out of what Neighbourhood the Jury muſt come; for if they come out of a wrong Place, 'tis a Miſ-Trial; as for Inſtance, If the Fact is alledged to be done *in quadam platea vocat' King-ſtreet*, in the City of *Weſtminſter*; the Jury cannot come out of *platea*, becauſe 'tis neither Town, Pariſh, Hamlet, or Place known out of the Neighbourhood, where a Jury can come by Law; neither ſhall it come out of *Weſtminſter*, but out of the Pariſh of St. *Margaret*; and his Reaſon is, becauſe that is moſt certain. *Co. Lit.* 125.

But I think this Reaſon is not very convincing; for he agrees in the ſame Paragraph that if the Word *platea* had been left out, then the other Word *King-ſtreet* would have been a more certain Place than the Word *parochia*, becauſe it being generally alledged, and without any Addition, it ſhall in Law be intended to be a *Town*, which is always more certain than *parochia*, becauſe there may be ſeveral Towns in one Pariſh.

Now to apply this to the principal Caſe, *ſſ.* The Fact is laid to be *apud Warwick*, which is a Town, and out of that Neighbourhood, the Jury muſt come, and not from *Rugby*, which tho' in the County of *Warwick*, may be far from that Town; and therefore the Defendant by pleading ſeveral tranſitory Matters, and alledging them to be done *apud Rugby*, ſhall not draw the Venue from *Warwick* Town; for then the Trial would be by a Jury *non de viceneto*.

Prynce verſus *Crompton*.

Tempeſt. Mich. 12 W. III. Rot. 349.

Shropſhire, ſſ. DEBT brought by an Adminiſtratrix of Francis Prynce, who was Sheriff of the County; and this Action was brought upon a Sheriff's Bond; but the Plaintiff did not declare that the Defendant became bound to Francis Prynce, nuper vic. Com', &c.

The

The Defendant pleaded the Statute 23 H. 6. that the Bond was taken colore officii.

The Plaintiff replied and set forth a Latitat brought against G. L. and the Return and the Arrest by Francis Prynce, adtunc vic. Com. &c. and the Bond given to him for Appearance, &c. And upon Demurrer, this Declaration was held ill; because the Plaintiff had declared upon a Bond to Francis Prynce, and did not say he was nuper vic. Com. &c.

There was no Book cited in this Case, which upon the whole Matter seems to be but a Nicety; for tho' the Administratrix had not declared that the Defendant became bound to the Intestate *nuper vic. Com. &c.* yet in the Replication it appears he was so.

The Serjeant refers us to the Case of *Blewet* and *Appleby* afterwards in his own Book, but it was adjudged two Years before the principal Case; and it was thus,

* *Blewet* versus *Appleby*. Trin. 10 W. III. Rot. 1335. C. B.

ſſ. Debt was brought by * Blewet and Wolfe, and it was nuper vic. London in the Writ; but they declared that the Defendant confessisset se teneri eisdem the Plaintiffs by Name in 40 l. but did not say nuper vic. &c.

The Defendant craved Oyer of the Bond; but it was not entered in the Plea as it was in the principal Case; but the Condition was set forth; and then he pleads the same Plea, and that the Bond was taken colore officii.

The Plaintiffs pray that the Bond might be entered in hæc verba, which was done; and then they reply as in this Case: And upon Demurrer to the Replication the same Exception was taken, but it was not allowed; because, if the Omission of those Words nuper vic. Com. &c. is a Fault, it was cured by entring the Bond in the Replication; that where a Defendant craves Oyer of a Bond, he ought to enter it himself, as it was in this Case of Prynce and Crompton, and then it would have been Parcel of the Declaration, and it would have appeared to be given to the Plaintiff as Sheriff; but where the Condition is only entered, it doth not appear to be so.

That if the Defendant had pleaded non est factum to the Bond, it must be found against him; and having pleaded the Statute, he gave the Plaintiffs an Opportunity to reply, that the Bond was made to them as Sheriffs.

Cook, one of the Pronotaries produced ten Declarations like this; and thereupon the Plaintiffs had Judgment in that Case.

All that I shall observe on these two Cases is, That if the later Judgments are always supposed to be right, then the Judgment in this last Case must be wrong, because it was otherwise adjudged in the principal Case of *Prynce* and *Crompton*, in the same Court, two Years after that Judgment was given; but yet I cannot see any Reason for it; certainly there must be a Mistake somewhere: For if, when a Defendant craves *Oyer* of a Bond, he ought to enter it himself in his Plea, and 'tis then as Parcel of the Declaration; 'tis done so in the principal Case, and therefore it must appear that the Bond was given to the Sheriff; but if it had not been so, it still appears by

the Replication that he was Sheriff; and it did no more in *Blewet*'s Caſe; and yet there the Plaintiffs had Judgment.

'Tis true, there is ſome Difference between theſe Caſes; for in *Prynce*'s Caſe the Sheriff is not named, either in the Writ or Declaration; but in *Blewet*'s Caſe, the Plaintiffs are named Sheriffs in the Writ, but not in the Declaration.

Now in this laſt Caſe it was inſiſted, That the Declaration being the Ground of the Suit, ought to be very perfect, and not to be amended by the Replication; for if 'tis not perfect at firſt, the Defendant has an Advantage, which he may offer in his Plea, and which ſhall never be ſet aſide, by doing afterwards that which the Plaintiff ought to do at firſt; for if that ſhould be allowed, then he will not only be deprived of that Advantage, but of the Benefit of any other Matter; which he might have pleaded to the Action.

If an Action in Debt is brought againſt an Heir, the Plaintiff muſt declare againſt him as Heir, and that he was bound, &c. otherwiſe, after he has pleaded, the Plaintiff ſhall never enter his Bond.

Then it was ſaid, That the Bond in the Declaration in that Caſe, and that which is entered by the Plaintiffs, were different Bonds; for the one ſhall be taken to be made to them in their private Capacity, and the other appears to be made to them as Sheriffs; ſo that the Plaintiffs were miſtaken, and for that Reaſon their Action muſt fail; as if a Plaintiff bring an Action of Covenant againſt a Defendant in his own Right, when he ought to be charged as Executor; 'tis wrong, and the Action muſt fail; but notwithſtanding theſe Objections, the Plaintiffs in that Caſe had Judgment; but in the principal Caſe, Judgment was given for the Defendant.

The Reader may obſerve here are contrary Judgments given in the ſame Court, almoſt upon parallel Caſes; for both Actions are brought upon Sheriffs Bonds, and the ſame Plea is to both; and the only Objection was, That in the Body of the Declarations, it did not appear that the Bonds were made to the Plaintiffs as Sheriffs: Now if what was ſaid in *Blewet*'s Caſe be true, *viz.* That when a Defendant craves *Oyer* of a Bond, and enters it *Verbatim* in his Plea, 'tis then as Parcel of the Declaration; then in *Prynce*'s Caſe it muſt appear that the Inteſtate was Sheriff, for the Bond was entered *in hæc verba* in the Plea; however, in the Replication it was ſet forth, that the Bond was given to *Prynce adtunc vic. Com.* and yet the Plaintiff could not get Judgment.

But in *Blewet*'s Caſe, tho' there was a Variance between the Writ and Declaration, and tho' 'tis generally allowed that they ought not to differ, becauſe the one is the Ground of the other; and tho' it did not appear that the Bond was given to the Plaintiffs as Sheriffs throughout the whole Declaration, yet becauſe it appeared that they were ſo by the Entry of the Bond in the Replication, there the Plaintiffs had Judgment: And yet the Court ſeemed to incline the other Way; but their Opinions were alter'd by the ten Precedents,

shewed by the Pronotary; and I do not find that one of them was produced in *Prynce's* Case.

Brynley versus *Burgh*.

Tempest. Trin. 13 W. III. Rot. 1457.

London, ff. DEBT brought by Brynley the Son, as Administrator to his Father, setting forth, That Sir John Heydon became bound, and that he was seized in Fee of Lands in Bermudas; and to deceive his Creditors had covenanted with Burgh and Conyers to stand seized of those Lands, to the Use of Anne Bridges in Tail, Remainder to his own right Heirs; that Sir John died; and that afterwards, by a private Act of Parliament, reciting the said Conveyance, those Lands were vested and settled on the said Trustees, and on the Survivor of them and his Heirs, upon Trust to sell the same to such Purchaser as the Lady Anne Boughton should approve, &c. and that they should put out the Money at Interest upon Securities, to be approved by the said Lady, and should pay the same to Anne Bridges, at the Age of 21, or Day of Marriage; in which Act there was a Proviso, that nothing therein should extend to deprive the said Brynley of any Benefit at Law, to recover the Debt due on the said Bond, by charging the said Lands with it, in Case it should be proved to be the Deed of Sir John Heydon; and that in such Case the Trustees should pay the Debt out of the Purchase-Money, prout per actum, &c.

Then the Plaintiff alledged, That the Lands were sold for more than his Debt amounted to; which Debt being 200l. was still unpaid; and that they were chargeable with it, for that the said Sir John Heydon made this Conveyance by Fraud, which the Plaintiff could prove; unde actib accrevit.

Upon Demurrer to this Declaration, the Defendant had Judgment, because it was mere Matter of Equity; for which the Plaintiff ought to exhibit his Bill in the Court of Chancery against the Trustees, and to make Anne Bridges a Party.

There was nothing said as to the Lands, whether they shall be taken to be personal Assets, to satisfy Creditors; for it hath been held, That Lands in the Plantations, tho' they are Inheritances, yet being in a foreign Country, they are esteemed as Testamentary Things and Chattels, in respect to Creditors.

2 Vent. 358.

Beale

Beale & Ux. verſus *Simpſon*.

Winford. Hill. 9 W. III. Rot. 321.

York, ſſ. DEBT for an Eſcape of a Perſon in Execution, brought by the Plaintiff and his Wife, who was Adminiſtratrix to John Stanhope, with the Will annexed, during the Minority of Mary and Hannah his Daughters, Executrixes and reſiduary Legatees, againſt the Defendant, who was head Bailiff of the Honour of Pontefract.

The Defendant pleaded, That before the ſuppoſed Eſcape, there was an Habeas Corpus directed to him, returnable * Cr'o. Pur. to bring the Body of the Priſoner to Weſtminſter; that by Vertue thereof he brought him into Court, and returned the Cauſe of his Commitment; who thereupon was ſent to the Fleet, quæ eſt eadem eſcapia.

* The third Return in *Hillary Term.*

The Plaintiff replied, That before the Eſcape an Habeas Corpus was directed to the Defendant, returnable † Octab. Hillarii; and that before the Return Day he did nothing upon it; but after it was returnable, he brought the Priſoner to Weſtminſter by Colour of the ſaid Writ; and when he was there, and not before, he procured another Habeas Corpus, which he had ſet forth in his Plea to be fraudulently proſecuted and delivered to himſelf; by Vertue of which laſt Writ, the Priſoner was brought to Weſtminſter, and committed to the Fleet; and traverſed that the Defendant virtute brevis de Habeas Corpus, mentioned in his Plea, did take the Priſoner and bring him to Weſtminſter.

† The firſt Return of *Hillary Term.*

And upon a Special Demurrer firſt, it was objected againſt the Declaration, viz. That the Plaintiffs had no Authority to bring this Action, becauſe it did not appear that the Executors were under the Age of 17 Years, but generally that they were under Age.

But it was not allowed, for the Defendant had admitted it by his Plea.

'Tis true, that where an Infant is made Executor, the Probate of the Will ſhall not be granted to him till he is of the Age of ſeventeen Years; and this Limitation was introduced by the Canon Law, as ſuppoſing that an Infant was incapable to act in the Execution of a Will till that Age; and therefore the Law provides, that Adminiſtration ſhould be committed to ſome Friend, during the Minority of the Infant Executor, *pro bono & commodo ſuo.*

Now, becauſe the ſame Law which hath limited this Time to ſeventeen Years, hath likewiſe made the Authority of ſuch an Adminiſtrator determinable at that Time; therefore when an Action is brought by him, 'tis neceſſary that he ſhould aver, that the Infant is under the Age of ſeventeen at that very Time, becauſe he may be above that Age; and yet, according to the uſual Notion of thoſe Words, in a general Senſe he may be under Age ſtill; that is, he may be under the Age of 21.

And

And this would have been a good Objection, if the Defendant had demurred to the Declaration; but he loſes that Advantage by Pleading, becauſe by that Means he hath admitted the Plaintiff had Authority to bring the Action.

But in the principal Caſe, the chief Objection was made to the Replication, viz. That the Force and Authority of the Habeas Corpus **was traverſed; for it was** abſque hoc **that the Defendant, virtute brevis** Habeas Corpus, **mentioned in the Plea, did take the Priſoner out of Gaol: And this the Chief Juſtice held to be ill, becauſe it was Matter of Law that was traverſed; but the other three Judges were of a contrary Opinion; and ſo the Plaintiff had Judgment.**

In 1 *Saund.* 20. there is a Caſe very pertinent to this Purpoſe; it was Debt upon Bond brought by the Plaintiff, who was Bailiff of *Weſtminſter*; the Condition was, That one *Kingwell* ſhould appear *die Sabbati prox. poſt Octab. Pur. &c.* to anſwer *Bradſhaw, &c.*

The Defendant pleaded, That before he entered into the Bond, the ſaid *Bradſhaw* proſecuted a Bill of *Middleſex* againſt *Kingwell*, retornable *die Veneris prox. poſt Octab. Pur.* upon which there was a Warrant, by Vertue whereof he was arreſted; and being in Cuſtody, the Defendant gave the Bond *pro eaſiamento & favore*, which the Plaintiff accepted *colore officii, &c.*

The Plaintiff replied, That *B.* proſecuted the Bill of *Middleſex* in *Hillary Term*, retornable *die Sabbati, &c.* and a Warrant thereon, and that *Kingwell* was taken by it, and in Cuſtody at the Time he gave the Bond *virtute* of that Warrant, and not of the Warrant mentioned in the Plea.

The Defendant rejoined that *K.* was in Cuſtody *virtute* of the Warrant ſet forth in his Plea, *abſque hoc* that he was in Cuſtody *virtute* of the Warrant mentioned in the Replication; and upon a Special Demurrer, *Saunders*, who was of Counſel for the Defendant, apprehended that the Counſel on the other Side would have objected againſt this Traverſe, for the ſame Reaſon as in the principal Caſe, *viz.* that Matter of Law was traverſed; which was, that the Perſon was not in Cuſtody *virtute* of the Warrant, *&c.* but it was not ſo much as mentioned by Serjeant *Wild* and *Pemberton*, who argued for the Plaintiff upon another Point; and one would think it would not eſcape the Obſervation of both theſe Lawyers, if either of them had taken the Rejoinder to be ill by Reaſon of that Traverſe.

But *Saunders* himſelf, who very well underſtood the Nicety of Pleading, admits the Traverſe to be good by a *Nota* of his own at the End of that Caſe, and cites Caſes to prove it; which I have peruſed.

9 *H.* 6. 20. *ff.* In *Hob.* 52. there was a *Si. fa.* againſt an Executor, ſetting forth the Judgment; and then a Demand why he ſhould not have *Executionem.*

The Defendant pleaded, That the Plaintiff ſued out a *Ca. Sa.* againſt the Teſtator, *virtute* of which Writ he was taken, and died in Execution.

The Plaintiff replied, That he was not taken *virtute* of the ſaid Writ; upon which they were at Iſſue, and there was a Special Verdict found, *&c.* From which Caſe we may collect, that the taking *virtute* of the Writ is not Matter of Law; for if it had, it could not be put in Iſſue; but that 'tis merely Fact, and therefore iſſuable.

Camfield verſus Warren.

Cooke. Paſ. 12 W. III.

THIS was a Plea of Privilege of an Attorney of B. R. viz. that omnes Attornati of that Court, ought not to be impleaded elſewhere: And upon Demurrer it was held ill; for though omnes Attornati of that Court ought not to be ſued elſewhere, yet aliquis may; and ſo it was adjudged formerly. Style 359. Hardr. 164.

This ſeems to be a meer Nicety, for if the greater Number comprehends the leſſer, then the Defendant muſt be one of that Number; beſides the Adjective *omnis* ſignifies as well every one as all.

Wentworth verſus *Sqnibb.*

Winford. Paſ. 13 W. III. {Paſ. ult. præterit. Rot. 445. / Hill. ult. præterit. Rot. 677.

Midd. ſſ. THIS was an Action of Debt upon a Bond of 100 l. and upon a Judgment, &c. And upon a Plea in Abatement, that the Defendant was a Clerk of the Exchequer, there was Judgment that he ſhould anſwer over, and now he pleaded in Bar, That quoad the 100 l. Debt upon Bond, the Plaintiff had recovered a Judgment againſt him; and quoad the other 100 l. that the Plaintiff had taken him in Execution upon a Ca. Sa. and detained him till he paid the Debt, &c.

The Plaintiff demurred to the firſt Part of the Plea, and as to the other he replied, That the Defendant was not taken in Execution; and concludes to the Countrey.

The Defendant joins in Demurrer to the firſt Part, and demurs himſelf to the other Part; and the Court was of Opinion, That the Payment, as thus pleaded, is not good to avoid an Action brought upon the Judgment.

Becauſe 'tis only a bare Affirmation againſt a Record: There ought to be ſome Acquittance or Writing, to ſhew that the Judgment was ſatisfied. Cro. Car. 328.

2 Cro. 29. Yet in an *Audita querela* to avoid an Execution on a Judgment, a bare Suggestion that the Money is paid hath been held good; but the Reason may be, because that is not only a Suit at Law, but likewise in Equity; for 'tis a Commission to examine the Reason of the Judgment, and to have Relief.

Letten versus *Winne.*

Winford. Mich. 11 W. III. Rot. 436.

Surrey, ff. DEBT for Rent, wherein the Plaintiff declared, That William Angell was poſſeſſed of a Houſe, &c. for Term of Years, and made an Under-Leaſe to Nicholas Corbett, for twenty eight Years, rendering Rent and two fat Turkeys every Year, worth 10 s. or to pay 10 s. for them, at the Election of the Leſſor.

That this Term of twenty eight Years, was lawfully veſted in the Defendant Winne, that William Angell aſſigned the Reverſion to John Letten the Plaintiff's Teſtator, to whom the Defendant attorned; and that the ſaid Teſtator made the Plaintiff Suſan, his Executrix, who proved the Will, and that 64 l. was due to her for Rent, and 4 l. 10 s. for Turkeys, after ſhe had made Choice to have the Money in Diſcharge of the Turkeys, and Notice thereof had by the Defendant.

The Defendant pleaded in Abatement, That as to Part of the Rent due on ſuch a Day, and as to all the Money due for Turkeys, that the Plaintiff had brought an Action of Covenant againſt him upon the ſame Demiſe, and aſſigned the Breach in not paying the Rent, and 5 l. due for Turkeys; and that the Action is ſtill depending; and demurs to the Reſidue.

The Plaintiff replied Nul tiel Record as to the Plea in Abatement, and joined in Demurrer as to the reſt.

The Defendant rejoins quod habetur tale recordum; but upon his failing to produce it, he objected againſt this Declaration.

1. Becauſe 'tis ſaid, That William Angell was poſſeſſed, &c. when he ought to ſet forth his Title; but this was not allowed.

2. That ſhe ought to aver, That on ſuch a Day ſhe made her Choice to have the Money in Lieu of the Turkeys; and that ſhe gave Notice of it to the Defendant; and not to ſay, that after ſhe had made her Election, &c. & notitiam inde per eundem (the Defendant) habitam; for that is only an Allegation, and not an expreſs Averment, upon which an Iſſue may be taken.

But this Exception was likewiſe diſallowed; for the Defendant ought to tender either the Money or Turkeys, but he had done neither; and the Plaintiff by bringing the Action, had determined his Choice, to have the Money and not the Turkeys.

The Serjeant though he was Counsel for the Plaintiff, yet he seems to be against him in his Judgment, *viz.* That a formal Issue could not be taken upon such an Allegation of Notice; and therefore he puts a *Quære* to the Judgment given in Court, and advises his Reader to look into 1 *Mod.* 217. and to take particular Observation of that Case, which I have done, and 'tis thus, *ff. Trevill* made a Lease for Ninety nine Years, if *Joan*, *Anthony* or *John* should so long live, rendering an Heriot or 40 *s.* at the *Election* of the Lessor, his Heirs and Assigns, at their several Deaths *successive*, as named in the Indenture.

Trevill devised the Reversion, then *John* died first, and afterwards *Joan*, and the Question was, Whether an Heriot was due upon her Death? It was agreed that it was not due of common Right, but upon this particular Reservation; and therefore it ought to be strictly pursued, which could not be in that Case, because *John* died first, and the Heriot is to be paid upon their Death *successive*, as named in the Lease; but as to this Matter the Court gave no Opinion, but that which related to the principal Case was, That the Avowry set forth, That the Defendant had made his Election to have the Money instead of the Heriot, and that the Plaintiff *habuit notitiam* thereof, and did not say by whom Notice was given; and this was one Reason why the Plaintiff had Judgment; but there is nothing said that the Avowant ought to have averred the particular Time when he made his Election.

'Tis true, such an Averment would have made the Pleading a little more formal; but the chief Objection depended upon the Point of *Notice*, *viz.* the Avowant alledged, That the Plaintiff *habuit notitiam* of his Choice; Now because it was impossible to take an Issue upon that Allegation, therefore the Defendant ought to have averred that such a Person *dedit ei notitiam*, *&c.*

But notwithstanding this Case, I think the Judgment in the principal Case is grounded upon a better Reason; for *Notice*, *ex vi termini*, must signifie the making something known, which must be presumed not to be known to that Person before; and then 'tis necessary to be given; and in Pleading, the Plaintiff must shew by whom, for otherwise the Defendant is not subject to the Action, nor the Plaintiff intitled to bring it.

Now in the principal Case, the Defendant knew that he was either to pay so much Money, or so many Turkeys; and therefore he ought to tender either the one or the other; and because 'tis uncertain which would be accepted before the Plaintiff had made his Choice of one, therefore it seems reasonable that he should do it before the Action brought; for he hath an Interest in neither till the Choice is made; and then the Defendant ought to have Notice of it, because it seems to be a severe Way, for the Plaintiff to determine his Choice by an Action.

Robinson

Robinſon verſus *Corbett.*

Tempeſt. Trin. 11 W. III. Rot. 1628.

Midd. ff. DEBT againſt an Executrix, who pleaded ſeveral Judgments obtained againſt her, upon Bonds of her Teſtator, and that ſhe had fully adminiſtred, &c.

Upon Demurrer to this Plea it was objected, That the Defendant had not alledged that the Teſtator entered into theſe Bonds; ſhe only ſets forth, That Actions of Debt were brought againſt her, pro eo videlt. quod cum the Teſtator in his Life-time became bound, &c. per quoddam ſcriptum, &c. which is no more then a bare Recital, when ſhe ought to have ſet forth * expreſly, That the Teſtator entered into the Bonds, and then the Plaintiff might have replied that he did not, which makes a proper Iſſue.

* Saund. 328.

Sid. 230. Now to prove this the Caſe of *Brown* and *Purchace* was cited, ff. Debt againſt an Executor, who pleaded a Judgment obtained againſt him, *ultra quod* he had not Aſſets; and upon Demurrer it was objected againſt that Plea, That the Defendant did not ſet forth upon what the Judgment was obtained; for if it was not upon Bond, 'tis no Bar: And the Court was then of that Opinion.

'Tis true, 'tis ſaid at the end of that Caſe, That the Plaintiff might reply, That the Teſtator did not enter into ſuch Bond; but it was only a Saying *obiter*, and not the Opinion of the Court.

1 *Brownl.* 49. The Caſe in 1 *Brownl.* is nothing to the purpoſe; for there the Defendant pleaded ſeveral Judgments in Bar, and the Plaintiff replied they were obtained by Fraud, and the Jury found that two of the Judgments were ſo obtained, which falſified in the Plea in Part, and thereupon the Plaintiff in that Caſe had Judgment.

But it was adjudged, That the Defendant need not alledge that the Teſtator entered into theſe Bonds, becauſe the Plaintiff could not reply non ſunt facta, &c. for none but the Heir, Executor or Adminiſtrator of the Teſtator can plead that Plea; neither is it neceſſary for the Defendant to plead, That the Judgments were obtained pro veris & juſtis debitis, for that ſhall be preſumed; ſo that if the Plaintiff think fit to reply to this Plea, he muſt inſiſt, That the Judgments were obtained by Fraud.

The Serjeant tells us, there are ſome Precedents where 'tis omitted, that the Teſtator was bound *per ſcriptum obligatorium*, which are as follow.

**Tho. Ent.* 149. In *Thomp. Ent.* 149. the Plea is like this, *viz. pro eo videlt. quod cum* the Teſtator, *&c.* * *per quoddam ſcriptum ſuum obligatorium* became bound, *&c.*

In the ſame Book 157, 158. the Defendant pleaded a Judgment recovered againſt his Teſtator, but doth not ſay upon what.

In the ſame Book 179. the Plea was, That the Teſtator *cognovit ſe deberi* generally, without ſaying upon Bond or Bill.

Ladd verſus *Garrod.*

Winford. Paſ. 9 W. III. Rot. 321.

Norfolk ſſ. DEBT upon Bond dated 23 Auguſt, conditioned to pay Ten Shillings for every Twenty Shillings, which the Plaintiff ſhall by ſufficient Proof make appear to be owing to him, from Joſeph Kingdon, and to pay one half of it on the 25th Day of November following.

The Defendant pleaded, That the Plaintiff did not make it appear that Kingdon owed him any Money.

The Plaintiff replied, That before the ſaid 25th Day of November, he and the ſaid Kingdon accompted, who acknowledged that he then owed the Plaintiff 310 l. And upon Demurrer to this Replication it was objected, 1. That this was not a legal Proof of the Debt, becauſe the Law allows no Proof but in a judicial Way.

There were many Caſes cited as to this Matter, which I have peruſed; and upon the whole I find the Law to be thus. 10 *Ed.* 4. 11. *Cro. Eliz.* 205. *and not* 305. 2 *Cro.* 232.

ſſ. The Word *Proof* is generally underſtood to be by Jury, becauſe that is the moſt notorious and reaſonable way of Proof; yet 'tis not always ſo taken, for in many Caſes, the Agreement and Intention of the Parties ſhall prevail againſt this Conſtruction in Law.

As for example, if the Parties agree, that Proof ſhall be made before a private Perſon, it ſhall not be by Trial, becauſe ſuch Perſon hath no judicial Authority to try a Cauſe by a Jury.

So if it appear that the Proof is to be made in ſuch a limited Time, that there could be no Trial in it according to the Courſe and Rules of Law; there another Proof muſt be allowed, which ſeems to reſemble this Caſe; for the Bond was dated 23 *Auguſt*, and the firſt Payment of the Money was to be on the 25th of *November* following, which the Serjeant computes to be a Month and two Days within the Term; but I think he is miſtaken in his Computation, for from the 23d of *October*, to the 25th of *November*, is a Month and five Days in the Term: However, there could be no Proof in an Action within that Time, becauſe it could not be tried by the Courſe of the Court, before the 25th of *November*, which was the firſt Day of Payment, *&c.*

But where the *Proof* is not limited to ſo ſhort a Time, but that it may be made in Court according to the uſual Method of Trials, there it muſt be by a Jury; As if a Man covenants to pay Money within three Months after the Date of the Deed, upon Requeſt, and due *Proof* made, That an Apprentice imbezilled Goods, this muſt *Hob.* 217. 1 *Bulſt.* 40. *idem.*

be by Proof in Court, becauſe the Matter may be tried in that Time.

2 Cro. 381. Hob. 92. Moor 845. Now that the Agreement of the Parties may alter the manner of the Proof, there is the Caſe of *Gold* and *Death*, which is reported in ſeveral Books, and which was thus,

ſſ. Debt upon Bond conditioned, That if an Apprentice ſhould waſte his Maſter's Goods, then the Obligor was to pay Money *within three Months* next after due *Proof by Confeſſion* of the Party, or otherwiſe; here the Proof was referred to the Confeſſion of the Party, which muſt be underſtood a voluntary Confeſſion, and not upon Record: And therefore a Confeſſion produced under the Hand of the Apprentice, was held to be a good Proof.

2 Cro. 488. Three Years afterwards the very ſame Matter came in Queſtion, but between other Parties. *ſſ.* It was between *Lee* and *Fydge*, and there the Defendant pleaded that there was no Proof, either by the Confeſſion of the Party, or otherwiſe; and the Plaintiff replied *quod probatio facta fuit, &c.* And upon Demurrer to that Replication the Defendant had Judgment, becauſe the Plaintiff did not ſhew *how* the Proof was made, which he ought to do, eſpecially in that Caſe, for he had three Months Time to try it.

2. But admitting the Confeſſion of a Perſon to be good Proof, yet it would not be ſo if Kingdon had confeſſed, for he was a Bankrupt, and therefore not to be credited.

The Anſwer was, If the Plaintiff had brought his Action againſt Kingdon, no Man will deny but his Confeſſion or Demurring without Cauſe had been good Evidence againſt him, that he was indebted, &c.

Then as to his Credit, 'tis agreed in the Condition of the Bond, that Kingdon owed Money to the Plaintiff, and that he was inſolvent, and that it muſt be likewiſe agreed, That no Man could better aſcertain the quantum than himſelf; and 'tis not to be preſumed that he would make up a falſe Accompt with the Plaintiff, and by that Means wrongfully charge the Defendant, who had been ſo very kind, as to become engaged for his Debt. The Plaintiff had Judgment.

Briggs verſus *Mond.*

Cooke. Hill. 9 W. III.

Kent. ſſ. DEBT upon Bond, conditioned to pay the Plaintiff 10 l. if ſhe ſhall indempnifie one Tho. Sheafe, from all Coſts and Charges which he ſhall ſuſtain, for or by Reaſon of her being with Child.

The Defendant pleaded, That the Plaintiff Ann Briggs, was with Child, and that upon her Examination, ſhe charged the ſaid Sheafe to be the Father of the ſaid Child, who was thereupon taken

and brought before a Justice of Peace, and ordered to find Sureties for his Appearance at the Sessions, and that he appeared there, and was at the Charge of 5 l. &c.

The Plaintiff replied, That she was delivered of a Male Bastard Child, which was begotten by the said Sheafe, &c. and that from the Time of making the said Bond hucusq; the Defendant had not been damnified, or at any Charge for or towards the maintaining the said Child.

And upon Demurrer it was held, That the Intent of this Condition was, That the Plaintiff should have 10 l. to indempnifie Sheafe from Maintaining the Child, and not from any legal Prosecution against him for the Fact, because then the Condition had been against Law.

As for Instance. *If.* Debt was brought on a Bond conditioned, That the Obligor should not hurt, indanger or molest the Obligee in his Lands or Goods, *by Reason of any Thing whatsoever*; which Words must be intended, That he shall not *wrongfully* hurt or disturb him, and shall never be construed to restrain him from prosecuting the Obligee for any Crime or other just Cause. *Cro. Eliz.* 705.

Now since the Condition of this Bond was agreed by the Court not to be against Law, I cannot tell for what Purpose any Cases should be cited to prove that Conditions against Law are void; which is a Thing so apparent in it self, that it needs no manner of Proof; and therefore the Case in *Moor*, 477. might have been spared, where the Husband gave Bond to maintain a Woman as his lawful Wife, and he pleaded that she was married to another Man; which if true, the Condition of that Bond must be void.

Baron & al' versus *Berkley.*

Winford. Mich. 9 & 10 W. III. Rot. 340.

Midd. If. THE Plaintiffs as Administrators of George Baron, brought an Action of Debt against the Defendant, setting forth, That they had obtained a Judgment against him and Anne his Wife, who was Executrix of one John Juar, for 27 l. Debt and Costs, which Judgment was not satisfied.

That Anne the Wife died, and that after her Death, Execution was taken out against the Husband, but not executed; that after the Death of Juar the Testator, several of his Goods came to the Possession of the Defendant Berkley and Anne his Wife, to the Value of the Debt; which Goods the Defendant converted to his own Use, per quod actio accrevit, &c.

The Defendant demurred to this Declaration.

This is one of the shortest Declarations, and the longest Argument in the Book; but I cannot imagine for what, unless it should be that the Serjeant was willing to oblige his Reader in a more large and ample

ample manner, with the Learning of his Brother *Heath*, who was Counſel for the Defendant.

The Queſtion was, Whether this Action would lie or not? And the Serjeant argued it would not.

He agreed, if a Devaſtavit had been returned on a Teſtatum Fi. fa. and a Judgment had been obtained thereon againſt Husband and Wife; that in ſuch Caſe, the Husband might have been charged alone after the Death of his Wife.

So likewiſe if a Judgment had been obtained againſt Husband and Wife, for the Debt of the Wife dum ſola, and then ſhe had * died; the Husband ſhould be charged alone, becauſe the Nature of the Debt is altered by the Judgment; and this is the Caſe of Eyres and Coward, Sid. 333.

* But if ſhe die before Judgment, 'tis otherwiſe. Cro. Car. 519.

But in the principal Caſe there was no Devaſtavit returned, nor any Judgment thereon, but only an Averment in the Declaration, That the Defendant had converted the Goods of the Teſtator Juar; which was never yet allowed, to charge a Man after the Death of his Wife.

1 Rol. Abr. 919. In the Caſe of Trotman and James, there was Judgment againſt Husband and Wife, Executrix, &c. and a Fi. fa. to have Execution de bonis Teſtatoris, and thereupon a Devaſtavit was returned; but before any Judgment to have Execution de bonis propriis the Wife died, and then it was doubted, Whether the Husband could be charged alone? But certainly he could never be charged where no Devaſtavit is returned.

1 Saun. 216. Sid. 397. *idem.* 'Tis true, in the Caſe of Wheatly and Lane it was held, That Debt will lie in the debet & detinet againſt the Defendant, who was an Executor, upon a Devaſtavit only ſuggeſted in the Declaration; which though very like the principal Caſe, yet it differs from it, becauſe it was brought againſt the Executor himſelf, who was then living; but in this Caſe the Executrix was dead; and her Husband Berkley had not ſo much as the Right of Adminiſtration de bonis non, &c. for that muſt be granted to the next of Kin of the Teſtator Juar, to whoſe Eſtate the Defendant is a meer Stranger.

5 Rep. 73. *b.* 1 Inſt. 54. *a.* 'Tis not to be doubted but Waſting of Goods by an Executrix is a Tort, for which ſhe ſhall be liable if ſhe ſurvive her Husband; but he ſhall not be charged for it after her Death, becauſe ſhe was the Wrong-doer, and being dead, the Tort moritur cum perſona.

At Common Law an Action of Debt could not be grounded on a Tort, though very apparent; a fortiori it cannot lie upon a Tort, which is only ſuggeſted, as this was.

Suppoſe the Husband ſhould waſte Goods during the Coverture, which he had with his Wife as Executrix, &c. this ſhall be accounted the Waſte of his Wife, becauſe he had ſome Relation to the Executorſhip jure uxoris; but when that Relation is gone by the Death of the Wife, it ſeems very ſtrange, that a Wrong actually done by her, ſhould be transferred to him.

If an Executor of his own Wrong, had waſted Goods of the Inteſtate, and died, there was no Remedy at Common Law againſt his Executor; but now by the Statute 30 Car. 2. ſuch Executor is

Cro. Car. 2. cap. 7.

made liable in the ſame manner as the Inteſtate would have been if he had been living.

So if a Woman Executrix marries, and the Husband waſtes the Goods which the Wife had as Executrix, and ſhe dies, there is no Remedy at Common Law againſt the Husband.

My Lord Hale would ſcarce allow, That an Action of Debt would lie againſt an Executor, upon the ſuggeſting a Devaſtavit done by himſelf; but would never extend ſuch an Action againſt an Executor of an Executor, upon a bare Averment that Waſte was done by the firſt Executor. 2 Vent. 192.

I muſt admit this Argument of that Serjeant to be good, if the point had been, Whether an Action of Debt would lie againſt the Husband after a Judgment obtained againſt him, and his Wife Executrix; and ſhe dying before any Judgment is had againſt them upon a *Devaſtavit* returned?

But that was not this Caſe, for the Serjeant tells us, That Waſte was not ſo much as mentioned throughout the whole Declaration; for the Charge was, That the Husband *convertit & diſpoſuit* the Goods of *Jnar*, to his own Uſe; but if it had been mentioned, yet all the Caſes cited on the other Side prove, That an Action of Debt will lie againſt an Executor upon a Judgment obtained againſt his Teſtator, where a *Devaſtavit* is only ſuggeſted; and if the Judgment is obtained againſt the Executor himſelf, for a Debt due from his Teſtator, there it will lie againſt him in the *Debet* as well as in the *Detinet* upon the like Suggeſtion. 1 *Saun.* 216. 1 *Sid.* 102.

'Tis true, a perſonal *Tort moritur cum perſona*; but a *Devaſtavit* by the Wife, is not only a Perſonal Wrong in her, but in her Husband alſo; and therefore the Surviving ſhall be charged.

If they both commit a Treſpaſs, or are guilty of a Trover, the Action lies againſt the Husband after the Death of his Wife.

But the Caſe of *King* againſt *Hilton* and his Wife was ſaid to be in Point, That the Husband ſhall be charged alone. *ſſ.* There was a Judgment in Debt againſt Husband and Wife, as Adminiſtratrix to her firſt Husband, and a *Fi. fa. de bonis inteſtati*; and upon *nulla bona* returned, the Plaintiff brought another *Fi. fa.* againſt the Husband and Wife, with this Clauſe in it. *ſſ.* That if *tibi conſtare poterit*, that the Husband and Wife had waſted the Goods, then to levy the Debt *de bonis propriis*: Upon this laſt Writ the Sheriff made a Special Return. *ſſ.* That they had no Goods in their Hands of the Inteſtate; but that the Wife during her Widowhood, had waſted, *&c.* and that the Husband after Mariage *non devaſtavit*; but yet the Court held he was chargeable. *Cro. Car.* 603.

There is no Reaſon given for this Judgment; but it may be, that the Husband was held liable to the Debt, becauſe the Judgment was obtained againſt him and his Wife.

But my Lord *Rolle*, who reports the ſame Caſe, tells us, That Judgment was obtained againſt *the Inteſtate* himſelf, and that Adminiſtration was committed to his Widow, who waſted the Goods and married; and then a *Fi. fa.* was brought againſt Husband and Wife, to levy the Debt *de bonis inteſtati*; and upon *nulla bona* returned 1 *Roll. Abr.* 931.

torned, and another *Fi. fa.* and a Special Return as aforeſaid, the Husband was held liable; but this differs from the principal Caſe, where there was no Return at all made.

2 Sid. 102. Curia. The Caſe of Cory and Thynn was the very firſt wherein an Action of Debt was adjudged to lie againſt an Executor, upon a Judgment had againſt his Teſtator, and on a bare Suggeſtion that he had waſted the Goods; the uſual and antient Way was to have a Devaſtavit returned, and then this Action of Debt would lie againſt the Executor; but the other being a more ſpeedy Remedy, hath of late obtained,

My Lord Hale was of Counſel for the Plaintiff in that Caſe of Cory and Thynn, and would often ſay, That he had better Succeſs in it than he expected; for his Opinion was contrary to that Judgment; but he would never allow, that ſuch an Action ſhould be extended farther than to charge the Executor himſelf.

In the principal Caſe there was only a bare Suggeſtion of a Waſte, or Converſion, call it which you will; now admitting that a Devaſtavit had been actually returned, and the Wife had died before Judgment, her Husband ſhould not be chargeable; *a fortiori* where no Return is made; for a Devaſtavit is a meer perſonal Tort in the Wife, and dies with her.

Suppoſe a Wife is Tenant for Life, and her Husband commits Waſte, and then ſhe dies; he ſhall not be liable, though the Waſte was actually done by himſelf.

5 *Rep.* 75. *b.* 'Tis true, the Law is ſo, but that ſeems to be no Reaſon why the Husband ſhould not be charged in the principal Caſe, becauſe at Common Law an Action of Waſte did not lie againſt a Tenant for Life, which being found to be inconvenient, it was remedied by the Statute of * *Glouceſter*, which gives an Action againſt Tenant for Life: Now the Writ framed upon that Statute runs thus. *Quod non liceat alicui vaſtum facere de terris ſibi dimiſſis ad terminum vitæ vel annorum*; therefore a Man who holds an Eſtate during the Life of another, is not within that Statute, becauſe the Lands cannot be ſaid to be *ſibi dimiſſæ*.

* *cap.* 5.

The Court inclined to be of Opinion for the Defendant, viz. That the Husband was not liable; but ſaid, they would willingly relieve the Plaintiff if they could; for it ſeemed very hard, that the Debts of the Teſtator ſhould be unpaid, becauſe the Husband had the good Fortune to bury his Wife; and therefore Serjeant Levinz deſired, That ſince there might be a Remedy in Chancery, he might have leave to argue it upon the Equity of the Statute 30 Car. 2. cap. 7. which enacts, That if an Executor *de ſon tort* commits Waſte and dies, his Executor ſhall be liable in the ſame Manner as his Teſtator would have been, if he had been living; but before he argued this Point the Defendant died.

Cart. 2. *Anno* 16 *Car.* 2. in a Caſe between *Burrel* againſt *Richmond* and his Wife, there was a Judgment againſt the Defendant in Debt, who died inteſtate, his Widow adminiſtred, and then a *Sci. fa.* was brought againſt her, to ſhew Cauſe *quare Executionem non haberet, &c.* and *Judgment* thereon; then ſhe waſted the Goods, and the Plaintiff

brought an Action againſt her *ſuggeſting* a Waſte, and it was held good; but ſuch a Suggeſtion alone, without a Judgment on the *Sci. fa.* would have been no Foundation for an Action of Debt; and ſo it was held in the Caſe of *Ent* and *Withers*. 1 *Vent.* 321.

But theſe Actions were brought againſt the Executor himſelf, and not againſt an Executor of an Executor, or againſt any other Perſon after the Death of the Executor, as it muſt be if the Action lies againſt the Husband in the principal Caſe; and the Reaſon why it was never extended further than the Executor himſelf is, becauſe Waſte is a perſonal Tort, and dies with the Perſon who commits it; and ſo it was held by my Lord *Hale*, in the Caſe of * *Broke* and *Collins*, and by all the Barons of the Exchequer in Sir *Brian Tuck*'s, *Mich.* 32 *Eliz.* 3 *Leon.* 241. * 2 *Lev.* 110.

But yet there have been ſome contrary Opinions, particularly that of the Chief Baron *Turner* in the Caſe of † *Aſtry* and *Nevitt*, who held, That if an Executor *de ſon tort* waſte Goods and dieth, his Executor ſhall be liable; for the Tort doth not die with him, but his Executor ſhall be anſwerable, and the rather, becauſe he had the Goods; this was a little before the Statute 30 *Car.* 2. † 2 *Lev.* 133.

In Trinity Term 11 W. III. Judgment was given for the Defendant by the Opinion of the whole Court.

Plummer & al. verſus *Adams*.

Winford. Hill. 12 W. III.

Hertford, ſſ. DEBT by Executors upon a Bond of their Teſtator; the Defendant pleaded, That he owed Money to ſeveral Perſons, (naming them) and that they and the Teſtator gave him a Letter of Licence, provided that within two Months he would aſſign and ſecure all the Profits of the Tithes of the Rectory of Sacomb to the Uſe of his reſpective Creditors, as Counſel ſhould adviſe; and avers, that William Brown, his Counſel, did adviſe a Letter of Attorney to be ſealed by the Defendant, and to be delivered to one Hodgkin, to demand and receive of one Humberſtone, Tenant of the Parſonage-Houſe, and of the Tithes, all Rents and Sums of Money for the Tithes, till the Creditors ſhould be ſatisfied; and gave him Power to receive the ſaid Tithes, and obliged himſelf in the Penalty of 500l. not to revoke the ſaid Letter of Attorney.

The Plaintiff replied, That the Letter of Attorney was not a reaſonable Aſſignment of the Tithes; that it was made by Fraud, and not adviſed by the Counſel of the Creditors; and that William Brown was not a Counſellor at Law.

The Defendant rejoins that William Brown was a Counſellor at Law for him; and upon Demurrer it was objected againſt the Plea:

1. That

1. That the Letter of Attorney would be no Security for these Tithes, because 'tis always revocable in its Nature; and tho' the Defendant is to forfeit 500 l. if he revoke it, yet that is not material, for his Debts may amount to more.

Now the Forfeiture of 500 l. could not be any Security to the Creditors, according to the aforesaid Agreement, because they were not to depend upon such a Contingency, but were to be satisfied out of the Profits of the Tithes.

Suppose A. should covenant with B. to make such a Conveyance of the Manor of Dale as the Counsel of B. should advise; and he directs that A. should enter into * a Bond that B. should enjoy the Manor; A. is not bound to execute such Bond, because 'tis not an Assurance within the Intent of the Covenant: 'Tis as if a Man is bound to execute a Release to S. and he deliver it to a Stranger, to the Use of S. this is no Performance of the Bond.

* 1 Rol. Abr. 423. Noy. 18.

So if the Condition is, That the Obligor shall release all his Right in Blackacre to the Obligee, and he executes a Release to C. to the Use of the Obligee, this is no Performance of the Condition, because the Obligee had not the Release in Possession, but must bring a Detinue against C. to have it, which something resembles the principal Case; for the Creditors have no Power over this Letter of Attorney, for 'tis to remain with Hodgkin.

4 Leon. 12 †

2. It appears by the Composition, that the Debts were to be paid by and out of all the Profits of the Tythes; and the Letter of Attorney is to demand and receive all the Rents and Profits which should be due from Humberstone, who was a Tenant of the Tithes, &c. but it doth not appear that he was Tenant of all the Tithes.

3. Admitting this Letter to be good Security, then the Defendant ought to plead that he gave Notice to the Creditors what his Counsel had advised, and that the Letter of Attorney was made in Pursuance of such Advice; and he ought likewise to set forth to whom it was made, and when; for otherwise it is impossible that the Creditors should know it: And so it was held upon the new Act concerning Bankrupts; That if a Creditor, who is no Party to the Composition, brings his Action against the Debtor; the Defendant ought to plead, that he gave him Notice of the Composition.

The Plaintiff had Judgment; because the Defendant had not shewed that Humberstone was Tenant of all the Tithes; and for no other Reason.

Blewet & al' versus *Appleby*.

THIS Case is abridged in the Case of Prynce and Crompton antea 195.

2

Blacket

Blacket verſus *Criſſop.*

Tempeſt. Mich. 9 W. III. Rot. 363.

Northumberland, ſſ. DEBT upon Bond conditioned, That if the Defendant ſhould appear at the next County-Court to be held at Alnwick, then and there to proſecute his Action with Effect againſt W. R. for wrongfully taking and detaining his Cattle, viz. two Oxen, &c. and to make Return thereof, if a Return ſhall be adjudged by Law; and alſo to indempnify the Sheriff from delivering the Cattle, *&c.*

The Defendant pleads, That he replevied the Oxen which were delivered to him; and thereupon he gave Bond, which was taken colore officii, and not warranted by the Statute 13 Ed. 1. for that the Clauſe to indempnify the Sheriff was inſerted in the Condition: And upon Demurrer it was held, that the Bond was good; and that the Condition was according to the uſual Practice.

Studholme & Ux. verſus *Mandal.*

Tempeſt. Trin 9 W. III. Rot. 1945.

Cumberland, ſſ. DEBT by Husband and Wife, as Executrix of one Moriſon, upon a Bond for Performance of Covenants in a Leaſe of a Water-Mill; the Covenant upon which the Queſtion did ariſe was, That the Defendant, at the Expiration of his Leaſe, ſhould leave two Mill-Stones in the Mill, as good as when he entered, or elſe give Satisfaction in Money, as much as thoſe he left ſhould be worſe; according to the Diſcretion of the Parties who viewed the ſame at his Entrance.

The Defendant pleaded, That he left two Stones in the Mill at the End of the Term, and that the Parties who viewed thoſe which were there at his Entrance, could not tell how much the other were worſe.

The Plaintiff replied, That at the Time the Defendant entered, there were two Stones in the Mill, of the Value of 3 l. that at the End of the Term he did not leave any of that Value, nor give him Satisfaction in Money.

The Defendant rejoined the ſame in Effect as in the Bar; and upon Demurrer it was objected, That he ought to procure thoſe very Perſons who had viewed the Stones at his Entrance, to adjuſt how much thoſe he left were worſe, or leſs in Value, otherwiſe he had not performed this Covenant; for it was not pretended that thoſe he left were equal in Value with thoſe which were there at the Beginning of his Leaſe: Now this being a diſjunctive Covenant, which

is always for the Benefit of the Covenantor, he ought to shew the Performance either of the one, or the other.

Some Cases were mentioned to shew that the Defendant ought to procure the Persons to set a Value, &c. ff. If a Man is bound to resign a Benefice, he ought to procure the Bishop to accept his Resignation; so if one is bound to pay 100l. or so much as R. shall appoint, he ought to procure R. to appoint a less Sum.

But it was answered, That this being a disjunctive Covenant, if one Part becomes impossible to be performed, the Covenantor is excused from the other Part: 'Tis like a Bond wherein a Man is bound to stand to the Award of another; but he is not therefore to procure the Arbitrator to make an Award.

Curia. Covenants and Conditions are made for the Benefit of the Covenantors, if possible to be performed; but if not, then the Bond and Covenant is absolute.

Now in the principal Case there is no Impossibility to perform the Covenant; for if the Defendant could not procure the Persons to adjust the Value, yet he might leave as good Stones as those which were there when he entered.

This is not at all like a Bond of Submission to an Award: 'Tis true, both Parties are bound to stand to it, but neither of them is bound to procure it to be made; but in this Case, the Party is bound to leave such Stones, or to give Satisfaction.

Now this being in the Disjunctive, and by Consequence for the Advantage of the Defendant, he ought to procure the Viewers to settle the Damages, who were Strangers: 'Tis true; but he had undertaken for them.

5 *Rep.* 22. *Moor* 357. *Cro. Eliz.* 398. idem.

The great Case concerning disjunctive Conditions is that which is called * *Laughter*'s Case; and because the Reason of that Judgment hath been a little shaken, I shall be the more particular in it: *ff.* The Condition of the Bond was for the Husband to purchase for his Wife and *her Heirs*, some Lands of as good Value as the House was, which they consented he should sell, *or* should *leave* her as much Money as he should receive upon such Sale.

The Wife died first, so that it was impossible for the Husband to *leave* her the Money; and in an Action of Debt brought upon this Bond, Judgment was given for the Defendant; the Reason was, because the Condition being in the Disjunctive, and one Part of it being impossible to be performed by the Act of God, the Defendant is discharged from the Performance of the other Part.

The Serjeant tells us what a late Chief Justice had by *Tradition*, *viz.* That two of the Judges who were in Court when that Judgment was given, have since denied that any such Reason was alledged for it; which seems very strange: For Justice *Croke*, and Serjeant *Moor*, who report the same Case, give likewise the same Reason for that Judgment; and 'tis not very likely that my Lord *Coke* should be mistaken, for he was of Counsel in that very Case for the Defendant *Laughter*.

'Tis

'Tis true, Juſtice *Croke* tells us, that *Gawdy* held the Bond was not diſcharged, but that the Husband ought to purchaſe Lands for the *Heirs* of the Wife, becauſe he was obliged to do ſo by the Condition, and had Time, during his Life, to perform it; and that the Word *Heirs* in that Place was not a Word of Limitation, but of Purchaſe; but either he or my Lord *Coke* muſt be miſtaken; for *Coke* tells us, Judgment was given for the Defendant by *Popham*, Chief Juſtice, and the *whole Court*; which could not be, if *Gawdy*, who was then a Judge of that Court, diſſented.

However, we having the concurrent Teſtimony of my Lord *Coke*, *Croke* and *Moor*, of whom two were afterwards Judges, and one of them of Counſel in the Cauſe, I think we are rather to believe what they have written, than what the Chief Juſtice had by Tradition.

But I have this to object againſt that Opinion of *Gawdy*, that I take it to be of no great Weight, becauſe he was of a contrary Opinion in the very ſame Term, in a like Caſe between other Parties; for in * *Greningham* and *Ewre*'s Caſe he laid it down for a Rule, That where a Condition is in the Diſjunctive, and one Part of it becomes impoſſible to be performed by the Act of the Obligee himſelf, there the Obligor is diſcharged from the other Part; and his Reaſon is, becauſe in ſuch Caſe the Obligor hath his Choice to do either, and being deprived of that Choice by the *Obligee* himſelf, therefore he ſhall do neither. * *Cro. Eliz.* 396.

Now if this is Law, what Reaſon can be given, why the Act of God ſhould not work a Diſcharge, as well as the Act of the Party?

Now if *Gawdy* was againſt *Popham* in *Laughter*'s Caſe, he was againſt *Gawdy* in *Greningham*'s Caſe; which was thus: *ſſ.* The Condition of the Bond was to deliver Writings before *Michaelmas*, or to execute a Releaſe of them, *ſuch as the Counſel of the Obligee ſhould before that Time adviſe:* And here *Popham* very nicely diſtinguiſh'd, that this Condition was not abſolutely disjunctive, but upon a Contingency, which depended upon the *Counſels adviſing a Releaſe*; therefore, if he did not adviſe it within the Time limited, the Obligor is bound to perform the firſt Part, becauſe he never had an abſolute Choice to do which he pleaſed.

'Tis true, ſome Caſes have lately been determined upon the Authority of *Laughter*'s Caſe; as for Example, between *Warner* and *White*; the Condition was, That if the Plaintiff would diſcharge a Perſon who was under an Arreſt, then the Obligor would pay the Debt before *Chriſtmas*; and it was held that the Bond was diſcharged, becauſe one Part of the Condition was become impoſſible to be performed. 2 *Jones* 95. 3 *Lev.* 137.

I muſt confeſs this Reaſon hath been queſtioned; for ſuppoſe a Man, in Conſideration of 100 *l.* paid to him, covenants to make a Leaſe to *N.* before *Michaelmas* next for Life, *or* to repay the 100 *l.* and *N.* dies before *Michaelmas*; this is a disjunctive Covenant, and one Part of it impoſſible to be perform'd, and yet the 100 *l.* ſhall be repaid; and ſo it was adjudged when Sir *John* was Chief Juſtice.

And

Cro. Eliz. 864. *Moor* 645. idem.

And ſo likewiſe it was adjudged but ſix Years after *Laughter*'s Caſe, *viz.* That where a Perſon by the Condition of a Bond hath an Election to do one of two Things, there, if by any Act either of a *Stranger*, or of the Obligee, or of God, he is hindered to do one, he muſt perform the other; becauſe by the Condition (which is always made for the Benefit of the Obligor) he hath undertaken expreſly to do one; and it was his Folly he did not perform it, when it was in his Power.

But this is only true in reſpect to a Stranger; as for Inſtance, If a Man will covenant to deliver Goods, or to pay as much Money as *B.* (who was no Party to the Agreement) ſhall value them; there the Defendant ſhall never excuſe himſelf by Pleading that *B.* did not value the Goods; becauſe he had undertaken for him; and if the Defendant cannot procure the ſaid *B.* to value the Goods, he muſt pay the Money.

But 'tis not true in the other Caſes; *viz.* That where the Condition is in the Disjunctive, and the Defendant hath an abſolute Choice either to do the one, or the other Thing; there, if he is deprived of that Choice either by the Act of God, or of the Obligee, the Condition is wholly diſcharged; and ſo it was adjudged between * *Baſſet* and *Baſſet*, 28 & 29 *Car.* 2. *B. R.*

* 1 *Mod.* 264. 2 *Mod.* 200. idem.

Sayer verſus *Chaytor.*

Tempeſt. Paſ. 11 W. III. Rot. 341.

York, ſſ. AN Action of Debt was brought upon this Bond: ſſ. Noverint, *&c.* Nos (the Defendant and two more) teneri, *&c.* (to the Plaintiff) ad quam quidem ſolutionem obligo *Me*, *Hæredes*, *&c.* and it was brought againſt the Defendant alone.

He pleaded in Abatement that the other Perſons, named as well as himſelf, were jointly bound; and upon Demurrer, it was argued for the Plaintiff, That this Bond was ſeveral, as well as joint, becauſe the Words are obligo me, which muſt be intended every one reſpectively in the Bond; beſides, it may reaſonably be intended that the Defendant was chargeable alone, becauſe it doth not appear that the other two were living.

Cro. Eliz. 544.

To prove this, there was a Caſe cited between *Aſcue* and *Hollingworth*: ſſ. *Aſcue* acknowledged a Statute before the Mayor of *Lincoln*, of which by the Statute of *Action Burnel* there ought to be two Parts; one to remainn with the *Mayor*, and the other with the Clerk of the Statutes.

Aſcue only ſealed one Part, ſo the *Mayor* had none; for which Reaſon it was void as to a Statute; but the Queſtion was, Whether it was not as good as a Bond?

This Caſe was cited both for Plaintiff and Defendant; and well it might, for 'tis differently reported in ſeveral Books.

Juſtice *Croke* mentions it in * ſix Places, but takes Notice only in two, that *Aſcue* and *two more* were bound in the Statute; and in an Action brought againſt *Aſcue* it appeared, That he and other Perſons were jointly bound; and in the Plea the Defendant averred, *That they were living and not named*: And upon Demurrer he tells us, it was adjudged that an Action of Debt would lie upon this Recognizance, as if it had been a Bond, becauſe it never had any Effect as a Statute; and that it was well brought againſt *Aſcue* alone; † and the Reaſon was given by *Popham*, *viz.* becauſe it did *not* appear that the other two *did ſeal it*, *or that they were alive*; and that this Judgment was affirmed in *B. R.*

* *Cro. Eliz.* 319. 355, 461, 494, 532, 544.

† *Cro. Eliz.* 492.

Now certainly this muſt be a Miſtake; and this Report of Juſtice *Croke* might lead my Lord *Rolle* into the ſame Error; for to ſay that it did *not* appear that the other two *did ſeal*, *or that they were living*, is directly contrary to the Plea it ſelf, in which both theſe Matters were expreſly averred, and in the ** ſame Book.

2 *Roll. Abr.* 149.

** *Cro. Eliz.* 355.

Beſides the ſame Caſe is reported by Serjeant *Moor* and Mr. *Goldſborough*; and they both agree that the Judgment in the Common-Pleas was reverſed, becauſe this was not a Bond; for there was no Manner of Proof that it was *delivered* as ſuch.

Moor 405. *Goldſ.* 190. idem.

'Tis true, *Sealing* without *Delivering* makes a Statute good; but there muſt be both to a Bond; and the Intention of the Parties being to be reſpected in all Manner of Contracts, it plainly appears they intended this as a Statute; and being void as to that, 'tis wholly void.

Serjeant *Moor* gives another Reaſon for the Reverſal of that Judgment, which was; *ff.* Three were bound jointly, and the Action was brought againſt *Aſcue* alone; and upon *Oyer* of the Bond, it appeared that three were bound; ſo that upon the Plaintiff's own Shewing, the Writ muſt abate.

But as to this Matter, it hath ſince been ruled, That if upon *Oyer* of the Bond, in which three are named as bound, and the Action is brought againſt one, and he demurs to the Declaration, Judgment ſhall be given againſt him; for tho' it appears that two more are named, yet upon craving *Oyer*, *non conſtat* that they ſealed the Bond; and if not, then 'tis ſingle; ſo that if the Defendant will take any Advantage of ſuch a Declaration, it muſt not be upon a Demurrer, but upon a Plea in Abatement that two more ſealed the Bond, and that *they are living*, and pray Judgment *de Billa*, *&c.*

Sid. 420. 1 *Saund.* 291. idem.

The Serjeant makes a *Quære* whether theſe Caſes are for the Defendant, notwithſtanding they were cited to maintain his Plea, and ſoon reſolves it in the Negative that they are againſt him; and yet the Defendant's Plea differs very little from that in *Aſcue*'s Caſe: For in the one 'tis ſaid that two more, named in the Bond, were jointly bound with the Defendant, and not named in the Writ; in the other Caſe the Plea was the ſame, only with this Addition, *viz.* *That the Perſons ſo bound were ſtill living.*

'Tis true, it was the Opinion of the Court in that Case in *Sid.* that the Defendant ought to have pleaded, That two more sealed the Bond, and that they were *still living*; but there are some Precedents where that last Clause is omitted, as in *Aston's Ent. fol.* 7. *pl.* 21, *&c.* However, in the principal Case, Judgment was given against the Defendant that he should answer over.

Then he pleaded the same Matter in Bar to the Action, and averred that the other two were living; but it was adjudged against him, because this Matter is properly to be pleaded in Abatement, but never in Bar.

There was some Difference in Opinion, whether this Bond was not several as well as joint: For in the first Part of the Bond the Heirs were not bound, but in last Part 'tis said obligo me, Hæredes: Now if those Words shall not be taken distributively, then the Heirs of two of them are not bound; but certainly it was the Intention of the Parties to bind each of their Heirs, especially since the first Part of the Bond, viz. Nos teneri, &c. is joint.

Dottin versus *Dowrich.*

Cooke. Trin. 12 W. III. Rot. 131. Devon, ff.

DEBT upon Bond, the Condition was, That if the Ship called Mary Anne, &c. was safe in the Isle of May on such a Day, and well manned, victualled, tackled, and provided for a Voyage from thence to Virginia, and so back to Plimouth; and shall proceed in the said Voyage, and finish the same, and return to Plimouth, or some Port in England, then the Defendant would pay the Plaintiff 100 l.

The Defendant pleaded, That the Ship was safe in the Isle of May, beyond Sea, viz. apud Chudleigh; (that being the Place where the Plaintiff had laid the Venue) that she was well manned, tackled and victualled, but did not say well provided; that she arrived at Virginia beyond Sea, (viz. apud Chudleigh) but that in her Voyage from the Isle of May to Virginia she was broken and disabled by the Winds, and utterly destroyed, and so disabled to return and finish her Voyage.

There was an impertinent Replication and Rejoinder; and upon Demurrer to it, the chief Objection was to the Plea, viz. That it was not alledged that the Ship was provided for according to the Words of the Condition, which Words are not implied by manned, victualled or tackled, because by the Word provided, the necessary Repairs of the Ship are comprehended.

But then it was insisted for the Defendant, That he ought not to pay the Money until the Ship arrived in some Part of England; to which it was answer'd, That if the Ship should not arrive thro' any Neglect in him, then he ought to pay the Money; and it shall be intended

tended that he was in Fault, because he had not answered one material Part of the Condition.

'Tis true, the Ship may be disabled by Storms; but 'tis as true, that she might have withstood those Storms, if she had been well provided against them; which not being done, she became too feeble to resist them.

Therefore the Defendant ought to have pleaded according to the very Words of the Condition, or at least according to the most material Words, which he had omitted; for which Reason the Plaintiff had Judgment.

The Serjeant made an Observation on this Plea.

ff. 'Tis said the Ship was safe at the Isle of *May*, *beyond Sea*, *viz.* at *Chudleigh*, which is in *Devonshire*; and this he tells us is very absurd and repugnant in it self, which is very true; for there can be no Occasion of any such Allegation, because the Bond was made in *England*; and therefore an Issue arising upon any Thing relating to that Bond, and done beyond Sea, may be tried in that County where the Bond is alledged to be made. 2 *Lut.* 950. *B.* 1 *Inst.* 261. *B.*

Hepworth versus *Haigh*.

Trin. 1 Annæ. Rot. 1666.

IT doth not appear what this Action was; but there is a Plea in Bar.

ff. That the Plaintiff was a Grocer, and was indebted to several Persons, and became a Bankrupt; that a Commission of Bankrupcy was taken out against him, and thereupon he was declared a Bankrupt; and that the Debt for which he sued was assigned to his Creditors.

The Serjeant tells us, that Issue was taken that he was not a Bankrupt; but nothing further appears to be done in it: In this Plea, the Proceedings on the Statutes of Bankrupcy were set forth.

Thornton versus *Bethel* & al.

Winford. Pas. 1 Annæ. Rot. 566. & 567. C. B.

London, ff. DEBT upon a Charter-party, wherein the Plaintiff declared, that he let his Ship to the Defendants for a Trading-Voyage, and that he covenanted to sail (as soon as convenient) loaded with Coal from Hull, to some of the Western Coasts, and there to deliver them; and to sail from thence to Sligoe in Ireland, and take on Board the Defendants Goods there; then to sail from thence to Newfoundland, and there unload the

the said Goods, and to deliver them to such Persons as the Defendants should appoint to receive them there; and should take on Board some other Goods, &c. and then sail to any Part in Spain, Portugal, or France, and there to deliver them, &c. and to take more on Board, and sail from thence to London, Hull, or Newcastle, as the Defendants should direct, and to deliver the Goods there, &c. then he covenanted that the Ship should be well fitted, tackled, manned, &c.

That the Defendants covenanted that the Ship should be loaded and unloaded, and dispatched at every Port, and also to pay the Plaintiff 50 l. per Month, to commence from the Day the Ship broke Ground from the Western Coast.

Then the Plaintiff sets forth, That he hath performed all on his Part, and shewed how; and averred, That there was ten Months Pay due to him, from the Day the Ship broke Ground, to the End of her Voyage.

This is a very long Declaration upon a Charter-party, and I suppose 'tis printed for a Precedent, because the Serjeant tells us it was perused by Sir *Edward Northey*, the Attorney-General, and by three Serjeants; and 'tis probable that he was one of the three.

But all that can be observed from it is, that the Charter-party is exactly recited in the Declaration; and when the Plaintiff comes to aver the Performance on his Part, he shews in what Manner, just as he had covenanted in the Charter-party, only with this Difference, that in the Recital he did not alledge *Newfoundland* upon the Coast of *America*, nor *Spain*, *France*, or *Portugal*, to be *in partibus transmarinis*, because it was not so expressed in the Charter-party; but when he alledges the Performance, then he shews, that the Ports where he arrived were *in partibus transmarinis*, which the Serjeant says is necessary in respect of the Venue.

I cannot very well reconcile this to the Observation he made in the very last Case but one; where he tells us, That an Issue arising upon any Thing done beyond Sea, relating to a Bond or Obligation made here, shall be tried in that County where the Bond is alledged to be made; if so, why is it necessary to shew that the Fact arised *in partibus transmarinis*, in respect of the Venue?

Disceit.

Diſceit.

Earl of *Plymouth* verſus *Samuel Jones* & al'.

Worceſter, ff. THIS was a Writ of Diſceit brought againſt the Defendants, ſetting forth, That the Plaintiff was ſeized in Fee of the Manor of Bromesgrove, which Time out of Mind was antient Demeſne, and that all the Lands held of the ſaid Manor are pleadable in the Court there by the * little Writ of Right; That the Defendants intending to defraud the Plaintiff of the Profits of the ſaid Manor, levied a Fine in the Common Pleas, of certain Lands, Parcel thereof; and that by Reaſon of the ſaid Fine, thoſe Lands were now become Frank-Fee, and pleadable at Common Law; in Diſceit of the ſaid Court, and in Diſinheriſon of the Plaintiff, and to his Damage of 40 l. * Reg. 9.

The Serjeant hath obſerved the Form of this Writ, and tells us, That he cannot find an Original Writ of Diſceit in *Fitzherbert*, or the Regiſter, for levying a Fine of Lands held in antient Demeſne; but certainly he would not have his Reader infer from this Obſervation, that ſuch a Writ cannot be proſecuted, becauſe he could not find the Form in either of thoſe Books; for the contrary may be inferred from * *Fitzherbert* himſelf, who in his *Natura Brevium*, mentions forty Caſes where a Writ of Diſceit will lie, but ſets down the Form of five of thoſe Writs, and no more. * Fo. 98. *a.* 98. *b. Lett.* P. 99. *a. Let.* E.

Now it would be very abſurd to infer, That becauſe we do not find the Forms of Writs in all thoſe Caſes, therefore no ſuch Writs can be brought.

To Inſtance in one as the Law ſtood when *Fitzherbert* wrote. *ff.* A Man ſells Cloaths and warrants them to be of ſuch Length; the Buyer might have a Writ of Diſceit upon this Warranty, if they were not as long as he had promiſed at the Time of the Sale; but there is no Form of any ſuch Writ to be found.

He tells us there is a Writ in the Regiſter to vacate a Fine levied of Lands in antient Demeſne; which Writ he calls a *Ve. fa.* or *Sci. fa.* which, he tells us, is all one and the ſame Thing in effect. *Reg.* 133 *b.*

'Tis difficult to apprehend what he means by this, for I think thoſe Writs are not only different in Form, but neither of them are Originals, nor are there any ſuch Words in that very Writ in the Regiſter; and if 'tis true that Writs take their Names from the moſt eſſential Words in them, then that Writ to vacate that Fine, may be called a *Fi. fa.* rather than a *Ve. fa.* or *Sci. fa.* becauſe after reciting the Fine levied in the Common Pleas, and the Complaint of the Lord of the Manor, it commands the Judges of *B. R.* having called before them ſuch Perſons as they ſhall think fit, *quod fieri faciant* what to them ſhall ſeem juſt.

He tells us, he cannot find amongſt all his Books of Entries, more than three Precedents of Writs of Diſceit, for levying Fines of Lands held in antient Demeſne.

* *Winch Ent.* 26, 27. The firſt is in * *Winch*, which was an Action brought againſt the Cognizor of the Fine alone; and upon Demurrer to the Declaration, the Plaintiff had Judgment, becauſe the Demurrer was in Bar to the Action; that is, it began thus, *ſſ. Quod narratio* (of the Plaintiff) and the Matter therein contained, was ſufficient for him *ad actionem ſuam, &c.* to maintain, and concludes thus:

ſſ. *Unde pro defectu* of a ſufficient Declaration, the Defendant *petit judicium*, and that the Plaintiff *ab actione ſua præcludatur.* When 'tis in Abatement 'tis thus. *ſſ.* The Defendant *petit judicium de narratione*, becauſe the Declaration and the Matter therein contained is inſufficient for the Plaintiff *ad actionem ſuam, &c.* to maintain; and concludes thus, ſſ. *Unde, &c. petit judicium de narratione illa & quod narratio illa caſſetur.*

Herne 93. The next is in *Herne*, and there the Writ was brought againſt the Cognizee alone; and the other was in *Brownlow Redivivus*, and there it was brought both againſt Cognizor and Cognizee, when in Truth, all Perſons who have any manner of Intereſt in the Land, either in Poſſeſſion, Reverſion or Remainder, ought to be made Parties to the Writ; and therefore in 21 Aſſizarum, N°. 13. a Sci. fa. iſſued to ſummon one in Remainder to come in.

But I will put him in Mind of one more, 'tis in *Officina Brevium*, *fo.* 43. where a Writ of Diſceit was brought for this Matter.

Afterwards the Serjeant obſerves ſome Variations between theſe Precedents, for in Winch 'tis ſaid, That the Lands are placitat' & placitabilia in the Court of the Manor coram Ballivis & ſectatoribus ejuſdem Curiæ; but in Herne 'tis in the Court of the Manor only, without ſaying before whom.

2 Cro. 559. In ſome Precedents theſe Words are added, viz. per parvum breve de recto clauſo; and though to traverſe, that Lands are pleadable by ſuch Writ, the Conſequence of which is, That they are not antient Demeſne, yet ſuch Traverſe hath been held good.

Then he proceeds and tells us, That it ſeems ſtrange to ſome Perſons prima facie, that a Court ſhould be alledged to be held coram ballivis & ſectatoribus, but he ſoon reſolves that Difficulty; for he tells us, That in all the Precedents where thoſe Words are, the Perſons are particularly named, viz. coram *A. B.* & *C. D.* ballivis & ſectatoribus; and that his own Opinion is, That if in a Writ of

False Judgment, the Court should be alledged to be held coram *A. B.* & *C. D.* Ballivis & *E. N.* & *G. R.* ſectatoribus, **it would be naught, but gives no Reason for it.**

I ſhall not determine how much we are engaged to him for his Opinion, neither ſhall I enquire after thoſe Perſons to whom this Matter ſeems ſtrange; but I muſt affirm that the Serjeant is miſtaken in his Precedents; for in * *Winch* the Court is ſaid to be held *coram ballivis & ſectatoribus* without naming any particular Perſons, and ſo is his Precedent in *Raſtal*, Tit. *Antient Demeſne*, *fo.* 1 & 2. * *Winch* 26.

I cannot tell why he has jumbled all this Matter together, unleſs 'tis to ſhew his Obſervations on Precedents, which one would think he never look'd into; neither can I apprehend what he means by ſaying, the *Bailiffs* muſt be intended not only *Bailiffs of the Manor*, but *Suitors* to the Court; for there can be no Occaſion of any ſuch Expoſition where the Word *ſectatoribus* is added; and he hath not mentioned one Caſe where the Court was alledged to be held *coram Ballivis* only; for in the principal Caſe 'tis ſaid to be held *in Curia manerii*, without any farther Addition, and in all his other Precedents 'tis *in Curia manerii coram ballivis & ſectatoribus*, *&c.*

'Tis true, ſuch an Inference may be made from a Caſe in 3 *Leon.* which is thus, *ſſ.* The Demandant had recovered in a Writ of Right Cloſe, which was directed to the *Bailiff* of the Manor, and the Tenant brought a Writ of Falſe Judgment to reverſe it; and the Error aſſigned was, That the Writ of Right Cloſe was directed to the Bailiffs, and the Court was holden *coram ſectatoribus*; but the Judgment given in the Court of the Manor was affirmed; from which we may inferr, That the *Bailiffs* were intended to be Suitors of the Court, becauſe none elſe are Judges there. 3 *Leon.* 63.

In Zouch and Thompſon's Caſe, the Fine was levied between S. Thompſon Plaintiff, and John Sellon, and Elizabeth his Wife Defoxeants; and they being all dead, a Writ of Diſceit was brought againſt the Heir of the Cognizor Sellon, and againſt the Brother and Heir of the Cognizee, and the Ter-tenant and Purchaſer under the Fine; and it was objected, That the Writ did not lie againſt the Heir, becauſe it was a perſonal Wrong in his Anceſtor, which moritur cum perſona; but this Objection was not allowed; for it was not only a meer perſonal Injury, but it was a total Diſinheriſon to the ſucceeding Lords; and 'tis unreaſonable that the Act of God ſhould defeat them of a proper Remedy. Hill. 7 W. 3. Rot. 1832. in C. B.

He tells us, the Court would not reſemble it to the Caſe of Veiors and Pernors, where the Action is confined to the *Life* of the Parties; but he would have done well to have explained theſe obſolete Terms, which I take to be thus.

ſſ. Veiors are thoſe who were ſent by the Court to view the Lands in Queſtion, for the better Deciſion of the Right; *Pernors* were thoſe who received the Profits of thoſe Lands: Now if in a *Writ of Entry ſur diſſeiſin* the Demandant ſhould recover by any Miſinformation or Misbehaviour of thoſe *Veiors*, and ſhould by Vertue of ſuch Recovery receive the Profits; and then he and the *Veiors* ſhould die,

no

no Writ of Diſceit would lie againſt their Heirs, becauſe (as it has been obſerved) it was a perſonal Tort, & *moritur cum perſona.*

There was another Objection in that Caſe of Zouch and Thompſon, which was, that admitting the Writ of Diſceit would lie againſt the Heir of the Husband, it ought not to be brought againſt him alone, but likewiſe againſt the Heirs of the Wife, becauſe both were Cognizors in the Fine.

But it was anſwered, That the Tenant is the proper Party to this Action; and if there is any Occaſion, all other Perſons may be brought in by Sci. fa. and this Fitzherbert tells us was de antiquo jure.

Fitz. Abr. *Tit.* Fines 30.

Then it was objected, That in the Writ and Declaration the Lord was called Dominus manerii, without ſhewing what Eſtate he had in it; but it was held, That 'tis not neceſſary, becauſe a Tenant for Life or Years may have this Action, who are Domini only pro tempore; and if this is any Defect, 'tis ſupplied by the Word ad exhæreditationem, &c.

Then a Queſtion was made, Whether this Fine ſhould be reverſed quoad the Benefit of the Lord of the Manor only, or entirely? And it was held that it ſhould be wholly reverſed.

And to prove this he tells us ſeveral Caſes were cited, but he names none, and therefore I ſhall venture to cite the Opinion of Juſtice *Hulſe*, in 7 *H.* 4. which I take to be ſuitable to this laſt Queſtion.

7 & 8 *H.* 4.

4 *Inſt.* 269. *ſſ.* That the Fine ſhould be totally reverſed; for the Reaſon why the Lord of the Manor ſhall be reſtored to his Juriſdiction is, becauſe the Fine was levied *coram non judice*; which makes it void in the whole? And this Inconvenience might happen if it ſhould be in force *quoad* the Cognizee, *viz.* That if a Remainder in Tail ſhould be limited upon ſuch a Fine, then when it veſts and comes in *eſſe*, the Remainder Man may bring a *Sci. fa.* againſt the Lord, and defeat him of that Juriſdiction to which he was reſtored by that very Fine; which would be very incongruous, and not conſiſtent with the Reaſon of the Law.

Dower.

HE begins this Title according to his usual Method, with long Pleadings out of Justice *Warburton*'s Manuscript, in *Mich.* 14 & 15 *Eliz. Rot.* 2906. which Manuscript hath been a great Help to the Enlargement of these Volumes.

ff. It was Dower of a third Part of eighty Messuages, and seven hundred Acres of Land, with the Appurtenances in several Wills.

The Tenant as to Part confesses, That the Husband of the Demandant died seized, and then he pleads in Bar, That after the Death of the Husband, his Widow intruded and received the Profits thereof, till Michaelmas 1 Ed. 6. and that on the third Day of August, the Tenant married the Heir at Law of the Husband, and thereupon at Michaelmas he entered, and that from that Time he was ready to render Dower; and as to another Part he pleads, That he was always ready from the Death of the Husband to render Dower; and as to the Residue he pleaded Non-tenure in Abatement.

The Demandant replied quoad the first Part of the Plea, she did not intrude; and thereupon they were at Issue; and as to the second Part, she required the Tenant to render it, but he refused; and as to the Residue, That the Defendant was Tenant of the Land; and Issue upon that; &c.

The Tenant rejoins, That he did not refuse to render Dower, and thereupon they were at Issue; but what became of the Case we are still to seek.

Bates versus *Bates*.

Trin. 8 W. III. Rot. 1453.

Northumberland ff. IN Dower, the Tenant pleaded, That the Husband was never seized, &c. and thereupon a Special Verdict was found to this Effect.

ſſ. That Ralph Bates the Father was ſeized in Fee, &c. and in Conſideration of a Marriage to be had between Ralph Bates his Son, and Margaret Bewick, he ſettled the Lands in Queſtion by Leaſe and Releaſe upon Truſtees, to the Uſe of Ralph the Son for Life, then to Truſtees as aforeſaid, for Ninety nine Years, to raiſe Portions for Daughters; then to the Uſe of the Heirs males of the Body of the Son, lawfully to be begotten, and for Want of ſuch Iſſue, to the right Heirs of the Son for ever; that the Marriage took Effect, and that they had Iſſue the Tenant Thomas Bates, and another Son and no more; that Ralph the Son ſurvived the ſaid Margaret, and afterwards married Anne the Demandant, and is ſince dead.

The Queſtion was, Whether this intermediate Eſtate for Years did not hinder the Execution of the Eſtate Tail? For if it did not, then the Wife muſt be endowed.

And as to that it was inſiſted for the Widow, That though the Eſtate for Life, and the Inheritance, were not ſo united that the Term might be merged therein, yet the Eſtate Tail was actually veſted in the Husband, becauſe the Freehold for Life, and the Inheritance being of the ſame Nature, are entirely in him, without any manner of Diviſion to be made by ſo ſmall an Eſtate as that is for Years.

1 Rol. Abr. 678. Nº. 7. That a Woman ſhall be endowed of a third Part of a Reverſion, expectant after the Determination of a Term for Years, and of a third Part of the Rent reſerved upon it, which ſhews, That a Term for Years is no Impediment to Dower.

That if there are two Joint-Tenants in Fee, and one makes a Leaſe for Years, this is not a Severance of the Jointure.

Sid. 83. This Caſe is not like that of Stephens and Brittridge, which was thus, ſſ. The Husband covenanted to ſtand ſeized to the Uſe of himſelf for Life; then to the Uſe of his Wife for Life, Remainder to the *Heirs males*, which he ſhould beget on her, and they had Iſſue only a *Daughter*; the Husband and Wife levied a Fine to the Daughter with Warranty; they died, and the Warranty deſcended upon him who was ſecond in Remainder, (for it ſeems there were more, though not mentioned in that Caſe) and that Remainder Man made a Leaſe to the Plaintiff in that Action: 'Tis true, it was adjudged that the Eſtate Tail was not executed in the Husband and Wife; for if it had, then their Fine had been a Diſcontinuance; but the Reaſon was, becauſe there was an *intermediate Eſtate for Life* limited to the Wife, which remained as a diſtinct and ſeparate Eſtate from the Inheritance.

But where the intervening Eſtate *is for Years*, there the Freehold and Inheritance are rejoined in the Husband *ſimul & ſemel*, ſo as to entitle the Wife to Dower, though *ceſſat executio* till the End of the Term, and ſo is *Perkyns*, *Sect.* 336.

'Tis unreaſonable to inſiſt, that ſo mean and inconſiderable an Eſtate in the Eye of the Law, as an Eſtate for Years is always eſteemed, ſhould hinder the uniting the Eſtate for Life and the Inheritance, ſo as to defeat the Widow of her Dower.

Such an Eſtate was ſo contemptible at Common Law, that it was always ſubject to the Tenant of the Freehold; for if ſuch Tenant had ſuffered himſelf to be impleaded by Colluſion in any real Action, on purpoſe to defeat the Eſtate for Years, the Leſſee had no Remedy to falſifie the Judgment, though obtained by ſuch Colluſion: But now by the Statute of * Gloucester, he hath Power to try whether the Judgment was rightfully obtained or not; and if found that it was got by Colluſion, he could have no Execution till the Term was ended; ſo that by the Statute 21 *H.* 8. a farther Remedy was provided, and that enables a Leſſee for Years to falſifie all manner of Judgments had againſt the Tenant of the Freehold upon feigned Titles.

* Co. Litt. 46. a.

My Lord Coke in Aſcough's Caſe tells us, If there is Tenant for Years Remainder to B. for Life, and the Leſſor grants the Reverſion, &c. the Attornment of the Tenant for Life is good, without any Manner of Regard to the Leſſee for Years, becauſe of the ſmall and inconſiderable Value of his Eſtate.

2 Rep. 135. a.

'Tis true, if there is Tenant for Life, Remainder for Life, Remainder in Fee, this intermediate Eſtate for Life will hinder him in Remainder from bringing an Action of Waſte againſt the firſt Leſſee for Life; but if the interpening Eſtate had been for Years, it would have been no manner of Impediment; for the Leſſee is only intitled to the Poſſeſſion and Profits, and is not at all concerned in the Freehold.

Now if this is ſo in Waſte, a fortiori it muſt be ſo in Dower, (which is a Favourite of the Law) where the Freehold and the Inheritance ſhould be ſo united as to ſhut out the Eſtate for Years, that being of a diſtinct and quite different Nature.

'Tis true alſo, That the Caſe in Perkyns is the only Authority in Point which can be found in the Books; but what is ſaid there, may be enforced by many other Caſes.

As for Inſtance, ſ. If there is a Leaſe for Life, Remainder to one for Years, who dies inteſtate, then his Adminiſtrator, and the Tenant for Life join in a Purchaſe of the Inheritance; the Fee is executed only for one Moiety: 'Tis true, the Term is not extinct, becauſe the Adminiſtrator had it not in his own Right; but though 'tis not extinct, it doth not hinder the Execution of the Fee as to the other Moiety.

Godb. 1, 2.

The Opinion of the Chief Baron Manwood, in that Caſe agrees with Perkyns, and probably might be grounded upon that Book, viz. Tenant for Life, Remainder to another for Years, Remainder in Fee to the Tenant for Life; here the Fee is executed in the Tenant for Life; for he may bring a Writ of Right, which no Body can do but he that is Tenant of the Freehold; and this ſhews that the intermediate Eſtate for Years doth not hinder the Execution of the Fee.

Shelley's Caſe, ſo far as it relates to this Matter, was thus. Edward Shelley covenanted with M. and C. to ſuffer a Common Recovery,

1 Rep. 93. Moor 136. *idem.*

covery, &c. to the Use of himself for Life, then to other Persons for twenty four Years, then to the Use of the Heirs males of his Body, Remainder over, &c.

One Point was, Whether the Heirs males in that Case, took by Descent or Purchase? My Lord Coke who argued for the Defendant, took no Notice of the intermediate Estate for Years, probably because he did not think it worth his Notice; but Serjeant Moor, who reports the same Case, tells us, that it was objected by the Plaintiff's Counsel, That the Interposition of the Estate for Years, between the Estate for Life and that in Tail, had prevented the Execution of the Estate Tail, so that it could not descend, but that the Heirs of Edward must take by Purchase.

But it was answered, That the intermediate Estate for Years did not hinder the vesting the Estate Tail in Edward, because the Term was but a Chattel.

Another Reason that the Husband in the principal Case had an Estate Tail executed in him is, because he had an absolute Power over it; his Fine or Recovery would have barred his Issue, and his Feoffment would have made a Discontinuance.

Now supposing that the Remainder in Fee had not been limited, (as it was) and a Writ of Right, had been brought, he might have joined the Mise (that is the Issue) upon the meer Right, which a bare Tenant for Life cannot do.

11 Co. 80. *a.* 'Tis true, a Tenant in Tail after Possibility, &c. may do it, but that is in respect of the Quality of that Estate which he once had.

1 Rol. Abr. 634. *Lett.* D. N°. 3. If Husband and Wife are seized of Lands to them, and to the Heirs of the Husband, his Feoffment is a Discontinuance.

Raym. 126. So where a Fine is levied to the Use of the Husband and Wife during their *joint Lives*, Remainder to the Heirs of the Body of the Wife by the Husband begotten; he dies, and she marries again, and suffers a Recovery, the Issue of the first Husband is barred; for though the Limitation was for their *joint Lives*, yet the Freehold did not determine by the Death of her Husband; but the Estate Tail is executed in the Wife *sub modo*.

If 'tis so where the Husband and Wife had a joint Freehold, *a fortiori* it must be so where the Freehold is in the Husband alone, as it was in the principal Case.

Now supposing that an Estate for Years had been limited, first to J. S. and then to Ralph Bates the Son for Life, Remainder to the Heirs males of his Body, &c. he might have an Action of Waste against the Lessee; and if he had been disseised, and the Disseisor had died seized, and then Ralph had died, and his Son had been compelled to bring an Action to recover the Lands, he could have no other Action but a Formedon in Descender, in which 'tis always requisite to allege an Estate Tail, and Seisin thereof in the Ancestor, for otherwise no Descent can be to the Heir; and in the Count or Declaration he need not take any Notice of the Estate for Years; for even he who hath no more than a Reversion in Fee, expectant

upon a Leaſe for Years, may plead that he is ſeized in *Dominico ſuo ut de feodo*, becauſe he may bring an Aſſize upon ſuch a Seiſin. Cro. Car. 324.

'Tis true, if the Truſtees had been to plead, they muſt have ſet forth, That the Husband was ſeized for Life, Remainder to them for Years, Remainder to the Heirs of the Husband; and the Reaſon is, becauſe in Reſpect to them the Husband had not a compleat Eſtate Tail.

'Tis true likewiſe, That in this Caſe the Husband could not make a Leaſe as Tenant in Tail might by the Statute 32 *H.* 8. becauſe 'tis expreſly thereby required, that upon ſuch, there ſhall be a yearly Rent reſerved payable to the Leſſor, and to his Heirs, &c. which may not happen in this Caſe, becauſe after the Eſtate for Life is determined, then the Term for Years may veſt in the Truſtees in Poſſeſſion, which will defeat the Iſſue in Tail from receiving the Rent due upon ſuch Leaſe; but 'tis no good Logick to infer, That becauſe the Husband cannot make ſuch a Leaſe, therefore his Wife ſhall not be endowed.

It was argued on the other Side, That the Freehold and Inheritance ought to be in the Husband ſimul & ſemel, otherwiſe his Widow ſhall not be endowed.

That in this Caſe the Husband was barely Tenant for Life and no more, and that the very Reaſon of Dower ceaſes here, which is generally held to be for the Support of the Widow and her Children; but 'tis too remote to expect any ſuch Thing after ſo long a Term for Years.

That there was a wide Difference between the Veſting and the Execution of an Eſtate, for it may veſt, and yet not be executed in Poſſeſſion; and without the latter the Widow cannot be endowed.

The Year-Books 1 *Ed.* 3. 15, 16. 40 *Ed.* 3. 13. are cited, which I have peruſed, and find nothing there relating to this Matter.

In *Br.* Title *Dower*, 89. 'tis ſaid, That a Woman ſhall not be endowed of a *Rent* reſerved upon a Leaſe *for Life* made by her Huſband, becauſe though 'tis a Freehold, yet 'tis no *Inheritance*; from whence we are to infer, that ſhe is dowable only where her Huſband died ſeized of an *Inheritance*, and with this my Lord * *Rolle* agrees in abridging the Year-Book 46 *Ed.* 3. 16 *b.* *ſſ.* That the Husband ought to have a Fee-Simple or Fee-Tail *in Poſſeſſion*; but the Serjeant bids us look into the Year-Book it ſelf, which I have done, and the Caſe is thus. * 1 *Rol. Abr.* Tit. *Dower*, *plac.* 9. 1

ſſ. Lands were given to the Husband and Wife in Tail, and for Want of ſuch Iſſue, Remainder over in Tail, Remainder to the Huſband in Fee.

The Wife died without Iſſue, the Husband married again and then died, the ſecond Remainder being living. The Queſtion was, Whether the ſecond Wife ſhould be endowed? But the Caſe was not adjudged upon that Point; for 'tis plain ſhe could not have Dower, becauſe of the intermediate Eſtate in Tail; Nay, Juſtice *Finchden* in that Caſe held, That ſhe ſhould not be endowed if the intervening Eſtate had been only for Life.

Now I cannot apprehend why the Serjeant is ſo curious, as to deſire his Reader to look into this Year-Book at large; for the Caſe is not at all pertinent to this at Bar, becauſe it was never yet diſputed, Whether a Woman ſhall be endowed where the intermediate Eſtate is either in Tail or for Life? For 'tis clear ſhe ſhall not.

Laſtly, He tells us, That upon the firſt Argument there was ſome Contrariety of Opinions in Court; but upon Arguing it the ſecond Time, when he was of Counſel for the Widow, the Court gave Judgment for her, without ſo much as debating the Caſe amongſt themſelves; from which we are to infer, that the Judgment of the Court was ſettled purely by the Force and Energy of his Argument; but this is only a Report of one Side.

He farther tells us, That the Chief Juſtice ſaid, Dower was a Demand out of the Freehold and Inheritance, and that both thoſe Eſtates were always in the Husband.

That both he and Juſtice Powell doubted whether the Husband could diſcontinue this Eſtate Tail; but that the Chief Juſtice held, That immediately upon the Death of the Husband, the Inheritance deſcended on his Son: But 'tis ſomething myſterious to apprehend what is meant by ſaying, a Woman is not dowable of a Seiſin *in inſtanti*.

That there is no Difference where the Eſtate for Years, either precedes or comes after the Eſtate for Life of the Husband; for in either Caſe he is not ſeized in Poſſeſſion.

And now to conclude he refers us to ſeveral Caſes, to learn how Judgment and Execution ſhall be where a Term for Years is in being.

¶ If a Man makes a Leaſe before Marriage, rendering Rent, and then marries and dies, his Widow ſhall recover Dower of the Reverſion, that is, ſhe ſhall have the third Part of the Reverſion expectant upon the Term for Years, and the third Part of the Rent immediately, becauſe 'tis incident to the Reverſion; for ſhe ſhall not wait for that till the Term expires, but the Sheriff ſhall put her in Poſſeſſion, and the Term ſhall ſtill continue. So is 1 Roll. Abr. 678. plac. 7. Winch 80. Cro. Eliz. 564.

Godb. 105. *Fulamb's* Caſe in *Godbolt* is likewiſe cited, but I cannot find any ſuch Caſe in that Book, I am ſure 'tis not in that Page, nor in *plac.* 105. There is a Caſe by that Name in 5 *Rep.* 115. but not to this Purpoſe; for 'tis no more, than that the Sheriff may reſiſt them who commit Waſte or cut down Trees, *&c.*

Lawrence

Lawrence versus *Dodwell*, & al'.

Tempest. Trin. 10 W. III. Rot. 1659.

Glouceſter ſſ. IN Dower, the Tenants pleaded in Bar, That the Husband of the Demandant deviſed Lands to her during her Widowhood; by Vertue of which Deviſe ſhe entered and enjoyed the ſame, and this they aver to be in Satisfaction of her Dower.

And upon Demurrer it was argued, That though at Common Law before the Statute of Uſes, a Right to a Freehold could not be barred by any collateral Satisfaction, yet now a Right of Dower might be barred by a Jointure; but then it muſt be expreſſed in the Deed, that 'tis a Jointure, or that 'tis in Satisfaction of Dower.

That where Lands are deviſed to a Woman generally, without expreſſing for what, there the Perſon who hath the Inheritance, ſhall not aver that ſuch Deviſe was in Satisfaction of her Dower, becauſe 'tis properly a Gift or Benevolence, and not a Jointure.

Beſides, Wills muſt be conſtrued according to the expreſs Words therein contained, for if they ſhould be expounded by collateral Averments, not warranted by any Words or Sentence in the Will it ſelf, it would be impoſſible to adviſe what might be done in Caſes of Wills.

Now if any Words in this Will do import, that the Deviſe of the Lands was in Satisfaction of Dower, it ought to be ſo pleaded, and the Will muſt be given in Evidence, to prove the Matter averred in the Plea; but if there are no ſuch Words, then the Averment is quite beſides the Will, which muſt never be ſuffered; becauſe Lands muſt not paſs but by plain and apparent Words in the Will it ſelf.

It was argued on the other Side, That Conſtructions of Wills might be made according to the Intent of the Teſtator, collected out of the Words: As for Inſtance, Lands are deviſed to A. after the Death of his Wife; this is an Eſtate to her for Life by Implication, though no expreſs Eſtate is deviſed to her by the Will. Br. Deviſes 48.

So if a Man deviſe that his Feoffees ſhall be ſeized to ſuch Uſes, and he had no Feoffees, yet the Deviſe is good for thoſe Uſes. Poph. 326.

So a Deviſe to John Cotton, where there are two of that Name, this may be ſupplied by an Averment out of the Will. 11 H. 6. 13. a.

What is given in a Will, is naturally preſumed to be a Benevolence and no more; and 'tis as natural to make an Averment to defeat ſuch Preſumption, that is, to aver that the Gift of the Land was in Satisfaction of Dower; that being the Intention of the Teſtator, and the very Conſideration of the Deviſe it ſelf.

Then as to the Nature of Averments, 'tis always foreign to the Deed, either in Words or Matter; for 'tis to prove ſomething material

terial, which is not compriſed in the Words of that Deed, to which it refers.

Now it would be very abſurd, to admit an Averment to be neceſſary in Pleading, and at the ſame Time to deny the Uſe which may be made of it.

Beſides, the Perſon who makes Averment, is to prove it by ſubſtantial Evidence, which is a good Reaſon why he ſhould not be denied to make it.

But Judgment was given for the Plaintiff; for an Averment muſt be made and collected out of the very Words of a Will in Writing, to which Words nothing muſt be added by any Averment out of them; neither ſhall they be abridged by any Condition added to them.

If it appeared in the Will it ſelf, that this Land was deviſed to the Woman for her Jointure, it had been good, though the Word Jointure had not been in the Will; as if it had been for her Proviſion and Maintenance, or Words which will amount to it, there the Intention may be collected out of ſuch Words, that it was to be in Satisfaction of her Dower.

But if any Evidence ſhould be admitted to prove what is only averred, and not contained in the Will, there would be this Miſchief; that one Part of the Will would be in Writing, and the other not; for Averments out of the Will are no more than parol Diſcourſes, and ſignifie as little.

The Caſe in the Year-Book 11 H. 6. is not like this, for there the Deviſe was to John Cotton, and there were two of that Name; and 'tis very true, That in ſuch Caſe a Man may aver which John Cotton was intended, becauſe there was one John Cotton written in the Will; but it cannot be averred, That Robert Cotton was intended, becauſe he was never named.

Moor 31. Dyer 61. Now the Reaſon why a Deviſe to the Wife generally, cannot be averred to be in Satisfaction of her Dower is, becauſe the Intent of the Teſtator ought to be collected out of the written Words in the Will it ſelf; and therefore, where there are no Words to ſhew that he intended the Deviſe to be in Satisfaction of Dower, there can be no ſuch Averment.

* 4 *Rep.* 1. * *Vernon*'s Caſe was cited on both Sides, as 'tis uſual amongſt Men, who make wrong Applications: Now either this Caſe is not clearly reported by my Lord *Coke*, or not rightly underſtood on either Side; it was thus:

ſſ. In Dower, the Tenant pleaded in Bar, That the Husband was ſeized in Fee, and made a Feoffment to the Uſe of himſelf for Life; then to his Wife for Life, Remainder to his own right Heirs; and there was an Averment, That the Eſtate thus limited to her for Life, was in Satisfaction of her Dower.

The Plaintiff replied and confeſſed the Feoffment, but ſaid, That the Limitation to her for Life, was upon Condition, That ſhe ſhould perform the Laſt Will of her Husband; and demanded Judgment if the Tenant ſhould be admitted to aver, that it was in Satisfaction of her Dower.

Now the fifth Reſolution in that Caſe was cited for the Tenant in this, *viz.* That tho' the Feoffment to the Wife was upon Condition to perform the Will of her Husband, and tho' it might be the very Conſideration of this giving her the Eſtate; yet it may be averred to be for her Jointure, becauſe that likewiſe is a Conſideration which may ſtand with the other: And therefore it was inferred, That if an Averment may be made of a Conſideration, not expreſſed in a Feoffment, it may as well be made of a Conſideration not expreſſed in a Will; which is this very Caſe.

Now this being alledged in Behalf of the Tenant, ſomething alſo was mentioned under this 5th Reſolution in Behalf of the Plaintiff: *ff.* It was there ſaid, That a Deviſe imports a Conſideration in it ſelf; and as it cannot be averred to any other Uſe, ſo it cannot be averred to be in *Satisfaction of Dower*, if it is not ſo expreſſed in the Will it ſelf.

But he that reads this Reſolution will find that this Clauſe has little Reference to it; for it was only to ſhew that my Lord *Brook* was miſtaken in his Report of the Caſe *6 Ed. 6.* upon the Statute *27 H. 8. cap.* 10. which enacts, That *where an Eſtate is limited to Husband and Wife, and to his Heirs, or to the Heirs of their two Bodies; or to them for their Lives, or to her for Life*, or otherwiſe *in Jointure*; that in any of thoſe Caſes ſhe ſhall not have Dower. *Br. Dower 69.*

Now my Lord *Brook* tells us, That if Husband and Wife are Joint-Purchaſers of any Freehold after Marriage, other than a Fee-Simple, 'tis a good Bar of her Dower; but if the Purchaſe is of a Fee-Simple, or if an Eſtate is deviſed to her, 'tis otherwiſe; becauſe Jointures of ſuch Eſtates are not mentioned in that Statute.

Beſides, he tells us, That Jointures intended by that Statute muſt be made either before, or during Coverture; and therefore a Deviſe of Lands cannot be a Jointure, becauſe it takes no Effect till after the Death of the Husband; and another Thing is, that all Lands were not deviſable at that Time, nor until *32 H. 8.*

Now what is alledged by my Lord *Brook*, is contradicted by my Lord *Dyer*; for he was of Opinion, that an Eſtate in Fee, made to a Woman in Satisfaction of her Dower, is a Jointure within the Equity of that Act; for 'tis a Proviſion for her during her Life and more.

'Tis likewiſe a Jointure within the Letter of the Act; for the Words are: *ff. If an Eſtate for Life, or otherwiſe*, be made to a Woman for Jointure, 'tis a Bar of her Dower; which Word *otherwiſe* extendeth to all other Eſtates, which may be as beneficial to her as thoſe mentioned in the Act.

Then to ſhew that my Lord *Brook* was miſtaken in ſaying, that an Eſtate deviſed by Will cannot be a Jointure; my Lord *Coke* cites *Randal* and *Leake*'s Caſe, wherein it was adjudged, that a Deviſe to a Wife for Life generally, cannot be averred to be for her Jointure, not for the Reaſons mentioned by my Lord *Brook*, but becauſe a Deviſe implieth a Conſideration in its ſelf, and therefore cannot be averred to any other Uſe than to the Deviſe, if not expreſſed in the Will; and ſo is my Lord *Brook* to be underſtood, *viz.* That an Eſtate devi-

ſed to the Wife, cannot be averred to be for her Jointure, unleſs 'tis ſo expreſſed in the Will it ſelf; and if 'tis expreſſed, then I cannot ſee what Occaſion there can be of an Averment, becauſe, as it hath been obſerved, 'tis the Nature of an Averment to prove ſomething which is not contained in the Deed it ſelf.

All that I ſhall ſay to this Caſe of *Leake* and *Randal* is, That one of the Judges obſerved it was not to be found in any other Book, and that he was not ſatisfied with the Reaſon of it, *viz.* That a Deviſe cannot be averred to be to the Uſe of any other than the Deviſee, becauſe a Deviſe implieth a Conſideration in it ſelf; which is a very ſlender Reaſon, for ſo doth a Fine upon a Grant and Render; (that is) in Conſideration of a Fine levied by *W.* to *N.* he granteth and rendreth a Rent to *W.* Here the Conſideration is expreſs'd, and yet another may be averred; but then it muſt be ſuch as may ſtand with, and be agreeable to, the Conſideration expreſſed.

Ejectment.

Ejectment.

Okyll verſus *Vaughan*.

Trin. 22 Car. II.

THIS Title is begun with a Plea in Bar, drawn by Sir *William Jones*, in which a Common Recovery, ſuffered in *Wales*, is pleaded; and nothing further was done.

Humfry verſus *Bathurſt*.

Winford. Hill. 35 & 36 Car. II. Rot. 694.

Kent, ſſ. EJECTMENT for Part of the Manor of Pullens, in which a Special Verdict was found, wherein the Caſe was:

ſſ. Paul Bathurſt was ſeized of the ſaid Manor in Fee, and made a Feoffment thereof to the Uſe of himſelf for Life, then to his Executors for ſeven Years; and after the Determination of that Eſtate, then to the Uſe of his Son Edward Bathurſt for Life; and ſo to his firſt Son in Tail-Male, Remainder to the right Heirs of the ſaid Paul, who died ſeized, &c. then Edward his eldeſt Son entered, and had Iſſue four Sons; ſſ. Thomas, Edward, William and Richard.

Edward the Father died, and Thomas his eldeſt Son entered, and ſuffered a Common Recovery of the Premiſſes; and upon his Marriage with Elizabeth Hooper, ſettled the ſaid Manor, &c. to the Uſe of himſelf and the ſaid Elizabeth for Life, then to the Heirs males of their Bodies to be begotten, Remainder to his own right Heirs; and died without Iſſue.

That Elizabeth his Wife entered, and was poſſeſſed, &c. and that William Bathurſt, the third Brother of Thomas, deviſed his Reverſion of the third Part of the ſaid Manor, after the Death of Elizabeth,

beth, to his Wife for Life, and then to his four Daughters by Quarter-parts; and died.

Elizabeth died, then Edward Bathurſt, the ſecond Brother and Heir of Thomas enter'd; that the Lands in Queſtion were Ancient Demeſne, and held of the Manor of Aylesford; and that Sir Thomas Colepeper, the Lord thereof, brought a Writ of Diſceit againſt Edward Bathuſt, the Son of Edward, to reverſe the ſaid Recovery, and had Judgment that it ſhould be reverſed.

That the Widow of William Bathurſt, who claimed by his Will, made a Leaſe to the Plaintiff, and that ſhe is yet living; and ſo made a general Concluſion.

In the Argument for the Plaintiff, there is a long Climax; for firſt it was alledged, that the Feoffment made by Paul Bathurſt was void, becauſe it was not executed by Livery and Seiſin, or by Attornment; and if ſo, the Lands muſt deſcend to Edward, who was his eldeſt Son and Heir; and from him to his four Sons, becauſe the Manor was Gavelkind; and then the Entry of Thomas, their elder Brother, was the Entry and Seiſin of all of them; for they were all Parceners by the Cuſtom of Kent.

If this is ſo, then William the third Brother, had Power to deviſe the Reverſion of his Part; and if ſo, then the Deviſe to his Wife is good; and by Conſequence ſo is her Leaſe to the Plaintiff.

But it was anſwer'd, That the Court cannot judicially take Notice of Gavelkind; the Cuſtom muſt be alledged in the Declaration: 'Tis the expreſs Text in Littleton; and my Lord Coke, in his Comment, commends him for ſaying it muſt be pleaded. Sect. 265.

And I muſt ſay that the Pleadings in this Caſe are very long, for there are two Deeds of Settlement, and a Will, ſet forth *in hæc Verba*; all which, if it will not ſerve to inſtruct, yet it may be of ſome other Uſe, I mean to enlarge the Book, which is all I can find material in the Caſe; for nothing can be collected out of ſixteen Pages, but that the Court cannot judicially take Notice that the Lands in *Kent* are Gavelkind; unleſs 'tis that the Serjeant was Counſel on the wrong Side; for he was for the Plaintiff, and Judgment was given for the Defendant.

Norton verſus *Ladd*.

Trin. 1 Jac. II. Rot. 695. C. B.

Norfolk, ſſ. IN a Special Verdict in Ejectment for Lands in Brinton: The Caſe was, ſſ. That Cooke was ſeiſed in Fee of the Lands in Queſtion, being Copphold, and had Iſſue three Sons and three Daughters: ſſ. Robert, Edmond and John; Cecily, Ellen and Anne.

That

That Edmond the Father having made a Surrender to the Use of his Will, devised the Lands to his Wife for Life, paying 10 l. per Annum to Edmond his Son, during her Life; and after her Decease, he devised the same to Edmond and his Heirs.

That Edmond the Son likewise made a Surrender to the Use of his Will, and then devised the Lands to his Sister Alice for Life, after the Death of Anne their Mother; and afterwards the whole Remainder to John Cooke, if he survive his Sister Alice; and if he should die before, then to his Sisters and their Heirs for ever.

That Edmond the Son died, and then his Sisters all died without Issue; then Anne the Mother died; and that John Cooke, the younger Brother of Edmond, was admitted, who made a Letter of Attorney, giving Power to two Persons to make a conditional Surrender of the Premisses to John Ladd, to be void upon Payment of 106 l.

That John Cooke and his Brother Edmond were dead, and that John Ladd, the now Defendant, was admitted, the Money not being paid.

That Cecily and Mary Cooke were Heirs at Law to Edmond Cooke, viz. Daughters and Heirs of Robert Cooke, who was Brother and Heir of Edmond; and they were now Plaintiffs in Ejectment.

The Question was, Whether John Cooke had an Estate for Life, or in Fee, by the Devise of the whole Remainder?

And as to that, it was argued, That those Words shall relate to the Land it self, and not to the Estate which the Testator had in the Land; and if so, then by transposing the Word whole, the Sentence will be thus: ſi. I demise the Remainder of my Lands to John Cooke, for the whole Estate, (that is, for as great an Estate as) I have given to my Sister Alice.

Many Cases were cited, to prove that Wills must be expounded according to the Intention of the Testator, collected out of his Words, as a Devise to a Man for ever, or to sell at his Pleasure; this imports a Fee. 1 And. 51. Bridg. 16, 105. Co. Lit. 9. B. 1 Bulſt. 62, 219, 222. Goldſ. 363.

But in *Dyer* 35. *pl.* 7. there is nothing to this Purpose.

It may be objected, That a Devise of all his Remainder doth amount to a Devise of his whole Estate; and that is a Fee.

But even by a Devise of his whole Estate, a Fee will not pass against the Intent of the Testator: As for Instance, if the Testator deviseth all his Estate in his Lands in S. 'tis true, this passes a Fee; but if by a subsequent Clause he devises the Remainder of all his Estate in S. this controuls the first Devise.

So where a Man devised his Lands to his Son and Daughter, equally to be divided; there the Word equally shall not relate to the Continuance of the Estate, but to the respective Occupation of the Devisees; for if it should relate to the Continuance of the Estate, then the Heir at Law would be disinherited; which was not the Intention of the Testator.

It plainly appears by the Circumstances of this Will, that the Testator did very well know what he did; for in the first Place, he gave his Sister Alice an express Estate for Life; and after the Limitation to John, he gave an express Estate to his Sisters in Fee: Now having so particularly set down what Estates shall pass both before and after the Devise to his Brother John, if he had intended a greater Estate to him than for Life, 'tis natural to suppose he would have expressed it in his Will.

It cannot be objected, that 'tis hard he should intend a Fee for his Sisters, and but an Estate for Life to his Brother John, because 'tis plain he preferred his younger Sister Alice before any of his Brothers; for they were to have nothing during her Life; besides, many Men have particular Reasons in the Disposition of their Estates to particular Persons; which may not stand with the general Reason of Mankind.

But it was adjudged, that by this Devise of his whole Remainder, an Estate in Fee passed; for 'tis the same as if he had devised his whole Estate, or all the Residue of his Estate in his Lands, which he had devised to his Sister Alice; for those Words in Propriety of Speech must relate to his Estate in the Land, which he had before disposed to his Sister, and not to the very Land it self; for if it should relate to the Quantity of the Land which he intended to give John, it would make the Devise very incertain, because in that Sense he had no Remainder; for he had devised all to his Sister; therefore it must naturally relate to the Estate, which he intended to give his Brother.

King versus *Dillistон.*

Belvin. Trin. 1 Jac. II. Rot. 1322.

Suffolk, ff. THIS was a special Verdict in Ejectment; the Case upon the Pleadings was thus: ff. The Lands in Question were Copyhold, Parcel of the Manor of Swefling, &c. That one Henry Warner, and Elizabeth his Wife, in Right of the said Elizabeth, were seized of the same for Life, Remainder to John Ballet in Fee; that there is a Custom in the said Manor, that if a Surrender be made to the Lord out of Court, it must be presented at the next Court, &c. And if the Person who had Right to be admitted doth not come in after three Proclamations in three several Courts, &c. then the Steward commands the Bailiff to seize it as forfeited to the Lord: That the said Henry Warner and Elizabeth his Wife made a Surrender out of Court to the Lady of the Manor, to the Use of Robert Freeman and his Heirs, who died before next Court, and that John Freeman, an Infant, was his Son and Heir; that this Surrender was presented at the next Court, and three Proclamations made; and no Person coming to be admitted, the

Lands were ſeized by the Lady of the Manor, who was Leſſor of the Plaintiff.

The Queſtion was, Whether an Infant, during his Nonage, ſhall be admitted to a Copyhold Eſtate, which he had by Deſcent; or whether upon his Neglect, or Refuſal, the Lord may ſeize it as forfeited?

The Pleadings are here at large, but the Arguments are in 3 *Mod.* 221. where three Judges held, That the Infant was privileged by his Infancy, and that the Lord could not ſeize during his Nonage; but the Chief Juſtice was of a contrary Opinion, becauſe the Eſtate remains in the Surrenderor till the Admittance of the Surrendree; and he may maintain an Action of Treſpaſs, which he could not do, but becauſe he is ſuppoſed to be in Poſſeſſion till another is admitted.

Therefore 'tis abſurd to ſay, That Infancy will protect a Right where the Infant himſelf hath none till he is admitted.

'Tis certain the Lord hath Right to a Fine upon an Admittance: Now Infancy hath been extended to delay a Remedy to recover a Right, but never to deſtroy it; for if the Infant ſhould die during his Nonage, and before he is admitted, the Defendant loſeth a Fine.

Hunt verſus *Bourne* & al.

Tempeſt. Hill. 5 W. & M. Rot. 763. C. B.

Hereford, ſſ. IN a ſpecial Verdict in Ejectment, the Caſe was thus: ſſ. That Thomas Andrews was ſeized in Fee of the Lands in Queſtion, who made a Feoffment thereof to the Uſe of himſelf and his Wife for Life; Remainder to the Uſe of his Daughter Mary Andrews, and the Heirs of her Body, begotten by one John Gwillym the younger, with divers Remainders over.

John Gwillym married the ſaid Mary Andrews, by whom he had Iſſue Thomas Gwillym.

That after the Death of all the ſaid Perſons, Thomas Gwillym entered on the Premiſſes, being Ancient Demeſne, and held of the Manor of Wormlowe; and then he and his Wife levied a Fine thereof in placito Conventionis, in the Court of the ſaid Manor; by which Fine, conceſſerunt the ſaid Lands to William Nurſe and his Wife, and to John Nurſe for their reſpective Lives, under the yearly Rent of ſix Pounds; by Vertue whereof they entered.

That afterwards, ſſ. 2 Junii. 24 Car. the ſaid Thomas Gwillym and his Wife levied another Fine in the ſaid Court, to the Uſe of himſelf and his Heirs; and at the next Seſſions by Bargain and Sale enrolled, he conveyed the Reverſion to Thomas Payne and his Heirs; and in November following releaſed all his Right to the ſaid Thomas Payne, &c.

That

That Thomas Gwillym died, leaving Iſſue Thomas Gwillym, his Son and Heir, who had Iſſue Richard Gwillym, the Leſſor of the Plaintiff.

That Thomas Payne received the Rent ſo reſerved and died; that the Reverſion deſcended to the Defendants; that the Survivor of the Nurſes died in the Year 1633, and thereupon the Defendants entered, and the Plaintiff entered on them, and ſo the Jury made a general Concluſion.

It was argued for the Plaintiff, That tho' a Fine may be levied in a Court of the Manor of ſuch Lands as are held in Ancient Demeſne; yet this being a Fine ſur conceſſit, would not bar the Entail made by Thomas Andrews, becauſe before the Statute 4 H. 7. no Sort of Fine was a Bar, but only a Diſcontinuance; and the Reaſon why it was ſo was, becauſe 'tis a Feoffment on Record.

Now this Fine is neither a Bar nor a Diſcontinuance; 'tis not a Bar, becauſe by the expreſs Words of that Statute, it muſt be a Fine with Proclamations to make a Bar to an Eſtate-Tail; and 'tis not a Diſcontinuance, 'tis levied in a baſe Court.

But admitting it is a Diſcontinuance, 'tis only ſo during the Lives of the three Nurſes; and the Survivor of them dying within twenty Years before this Action brought, the Entry of the Plaintiff is not barred by the Statute of Limitations.

And to prove that it was only a temporary Diſcontinuance, *Lit. Sect.* 620. was cited, where the Text is, That if Tenant in Tail make a Leaſe for Life, this is a Diſcontinuance only during the Life of the Leſſee: True it is, that the Tenant in Tail hath gained a new * Reverſion in Fee by ſuch a Diſcontinuance; but my Lord *Coke* in his Comment upon it tells us, That if the Tenant in Tail doth afterwards make a Grant of the Reverſion, expectant upon the Death of the Leſſee for Life, and then dieth, and the Leſſee † dieth, that the Entry of the Iſſue in Tail is lawful; for the Diſcontinuance being determined by the Death of the Tenant for Life, the Reverſion gained by ſuch Diſcontinuance muſt be void.

Therefore if this Diſcontinuance is only during the Life of the Survivor of the Nurſes, in ſuch Caſe the Statute of Limitations will not hinder the Entry of the Leſſor of the Plaintiff; for the Words of that Statute are, That no Entry ſhall be made but within twenty Years after the Title doth accrew. Now Thomas Gwillym, the Father of the Plaintiff, had no Title of Entry, becauſe the Eſtate for Lives was not determined whilſt he was living; but a Title commenced in the Life-time of his Grandſon the Plaintiff, upon the Death of the Survivor of the Nurſes.

But admitting the Fact to be within the very Letter of that Statute, yet as this Verdict is found, the Defendant can have no Benefit by it, becauſe ſeveral Excuſes are allowed by the Statute for not entring; as Infancy, Non compos, Impriſonment, &c. and that the Party may enter within twenty Years after thoſe Impediments are removed: Now it doth not appear by the Verdict, but the Father of the Plaintiff was obſtructed by ſome of thoſe Means; and if ſo, his Son may enter after that Impediment removed.

* *Becauſe all the Eſtates in Remainder are diſplaced by the Leaſe for Life, and turned to a Right.*

† *But if the Leſſee for Life had died firſt, then the Grant of the Reverſion had been good, and the Iſſue in Tail had been barred, becauſe the Grant of the Reverſion would then have been executed in the Life-time of the Tenant in Tail.*

Thoſe who argued for the Defendants, could not deny but this Fine was a Diſcontinuance pro tempore, but yet they inſiſted that the Leſſor could not enter, but was barred by the Statute of Limitations; becauſe Thomas Guillym his Father, was immediately upon the Death of Thomas Guillym his Grandfather, (and who made the Diſcontinuance) intitled to a Formedon; and he having not proſecuted it in twenty Years, that ſhall prejudice his Son though an Infant.

And to prove this the Caſe of Sawle and Clarke was cited, which is reported in ſeveral Books, and that Part of it which relates to this Purpoſe is thus: Cro. Car. 156. Jones 208. Latch 64, 72 *idem.*

If. Tenant in Tail made a Leaſe for three Lives, and afterwards granted the Reverſion by Fine, and died without Iſſue; then five Years paſſed during the Life of the Reverſioner; and it was adjudged, That immediately upon the Death of the Tenant in Tail, the Reverſioner was intitled to a Formedon in Reverter, and was not to expect the Death of the ſurviving Tenant for Life, (for it ſeems two of the three were dead) though he could not enter before all three were dead: But having ſuffered the five Years to paſs without bringing a Formedon, he was now barred, and ſhould not have five Years more after the Death of the ſurviving Tenant for Life, becauſe he had no new Title accrued by his Entry after his Death; for his Title commenced by the Death of the Tenant in Tail without Iſſue male; and was the ſame as well before as after the Death of the ſurviving Tenant for Life.

But in the principal Caſe Judgment was given for the Plaintiff, which was afterwards affirmed upon a Writ of Error in B. R. in which Court theſe Points were reſolved.

1. That a Fine may be levied of Lands held in Antient Demeſne, in the Court of that Manor of which they are held, notwithſtanding the Statute * de modo levandi Fines, which enacts, That Fines ſhall be levied before the Juſtices of the Common Pleas, and not elſewhere; becauſe a Writ of Diſceit lies to prohibit thoſe who hold Lands in Antient Demeſne, to levy Fines in C. B. and therefore it would be unreaſonable, that they ſhould not be permitted to levy them in the Manor-Court, when they can levy them no where elſe: That Statute only extended to invalidate Fines levied in Burrough-Courts, and other baſe and inferior Courts, and not to thoſe of Antient Demeſne. * 18 Ed. 1.

2. A Fine thus levied is a Diſcontinuance of the Eſtate Tail, but no Bar, for that muſt be by Vertue of the Statute 4 H. 7. that is, it muſt be a Fine with Proclamations.

3. That though the Cuſtom is found to levy Fines there upon a Writ of Right, yet this Fine levied in placito conventionis is good, becauſe 'tis found to be ſecundum conſuetudinem manerii; and there is no great Difference between a Writ of Right and this Action of Covenant; for both are real Actions.

4. That this Fine was not a Diſcontinuance in Fee, but for the three Lives only.

5. That the Plaintiff is not barred by the Statute of Limitations, although twenty Years were passed after his Father was intitled to the Formedon; for though 'tis true, he could not bring it now, yet he might enter after the Discontinuance was determined, and shall therefore have another twenty Years after his Title of Entry accrued.

Sleigh versus *Metham*.

Tempest. Trin. 9 W. III. Rot. 395.

Nottingham, ff. IN a Special Verdict in Ejectment; the Case was: ff. Joseph Curtis was seized of the Lands in Fee, and in Consideration of a Marriage and a Portion to be paid, he did covenant, grant and agree, all that Messuage, &c. to the Use of himself for Life, then to his Wife for Life, for her Jointure, &c. then to their first Son in Tail male, with divers Remainders over.

The Marriage took Effect, the Husband died; and the Question was, Whether these Words in the Settlement would amount to a Covenant to stand seized?

And it was argued, That Marriage and a Portion, were both valuable Considerations to raise an Use; That Uses did so far partake of the Nature of Wills, as to be governed by the Intent of the Parties; that it could not be denied but some Benefit was intended to the Wife; now if this Deed should not operate as a Covenant to stand seized, the Widow must be defeated of her Jointure.

That no Conveyance whatsoever admitted such Variety of Words as a Covenant to stand seized; and therefore it was not necessary that those precise Words should be inserted; but it was necessary, that Words in that and in all other Deeds, should be so construed, that the Intent of the Parties may not be defeated; and therefore those Words, viz. covenant, grant, conclude and agree, amount to a Covenant to stand seized, it being to support the Intention of the Covenantor.

Many Cases were cited to prove this Matter.

Crossing versus *Scudamore*. 1 *Mod.* 175. 1 *Vent.* 137.

ff. As where a Father did *give, grant, bargain, sell, alien, enfeoff and confirm* to his Daughter: These were all Words of Conveyances at Common Law, yet they were held to amount to a Covenant to stand seized.

Lade versus *Baker*. 2 *Vent.* 260.

A Grant of a *Rent-Charge*, without Attornment or Enrolment, cannot enure as a Grant, but it shall operate as a Covenant to stand seized.

Adams versus *Steer*. 2 *Cro.* 210.

If a Man aliens, bargains and sells a *Reversion*, (without any more Words) the Reversion passes, though the most material Word in such a Conveyance was omitted, which is the Word *Grant*.

So

So if a Man doth *give, grant and confirm* Lands in Consideration of Money, and if the Deed is enrolled, it shall operate as a *Bargain and Sale*, though those Words are left out.

So a Feoffment without *Livery* and *Seisin*, if made in Consideration of Marriage, enures as a Covenant to stand seized. *Walker* versus *Hall*. 2 *Lev.* 213.

The Words were, *ss. I give and grant* a Rent-Charge to my Cousin and his Heirs; these are Words of a Conveyance at Common Law, yet they enure as a Covenant to stand seized. *Osman* versus *Sheafe*. 3 *Lev.* 370.

So where the Son did *give and grant* Lands to his Mother and her Heirs; though this was a defective Conveyance at Common Law, yet it was held good by way of Use, to support the Intent of the Donor; and therefore it was adjudged, That an Use did arise to the Mother by way of Covenant to stand seized. *Coltman* versus *Senhouse*. 2 *Lev.* 225. 2 *Jones* 103.

But it was argued on the other Side; and first, it was agreed, That the Words grant, bargain and sell, would raise an Use to Kindred; but in this Case there was not any Word by which it might appear, that the Covenantor intended any Use should arise by way of Covenant to stand seized; for the Words covenant and agree are insensible, because it doth not appear what he covenanted or agreed to do; whether to levy a Fine, or to make a Bargain and Sale, or the like; then the Word grant will not raise an Use, because here is a Limitation of a Term for Years to Trustees, and the other Words are all Words of Conveyances at Common Law.

'Tis true, that Uses are founded upon the Intentions of the Parties; but then such Intentions must plainly appear, and be collected out of the very Words in the Deed, and must also be agreeable to the Rules of Law.

But this Covenant is so defective, that no Man can tell what the Covenantor intended, or how he would have the Deed executed, Whether by Fine, Recovery, or other Way? For 'tis not expressed in what Manner it should be: Now if the Defect of this Deed must be supplied by the Addition of some Words to make it Sense, who can tell whether that was or would be the Sense of the Covenantor?

'Tis usually allowed to transpose Words to make them subservient to the Intentions of the Parties, but never to add any, for that would be to make a new Deed; and this may serve for an Answer to all the Cases before recited, which were all resolved out of the very Words of the Deeds or Wills themselves, but never by adding new Words to them.

If one intended to devise Lands to the Heirs of J. S. and instead of that the Clerk writes to J. S. and his Heirs, this may be helped by an Averment; because the Intent of the Testator appeared in the very Words of the Will, though something more was written than he intended: But if the Devise is to the Heirs of J. S. and the Testator designed to give it to J. S. and his Heirs, there an Averment will not make the Will good to J. S. because the Intention cannot be collected out of the Words; so that an Averment may in some

Cases be allowed to take away a Surplusage, but never to encrease that which is defective in a Will: And this was the Opinion of my Lord Anderson in Godb. 131.

Style 240. Therefore, where the Intention of the Testator cannot be collected out of the Will it self, 'tis void; as a Devise to the Heirs males of any of his Sons, or to the next of Kin, this my Lord Rolle tells us, is cæca, ficca and senseless; and so is this Covenant.

Now if 'tis inconvenient to pass away Estates, upon Constructions of general Words in Deeds, without the usual Forms of Law; it must be much more inconvenient to add Words, or to construe defective Words, so as to make them take Effect, to convey Inheritances from one to another.

But notwithstanding this Argument, Judgment was given for the Plaintiff, because it plainly appeared, that the Man intended something for his Wife; and therefore the Court supplied some Words to make the Deed sensible, viz. He covenanted, granted and agreed, all that Messuage, &c. *To be* to the Use of himself for Life, and then to his Wife for Life, &c.

The Serjeant hath set forth a long Deed of Settlement in the Pleadings of this Case, which cannot serve as a Precedent, because 'tis defective; but it adds to the Bulk of the Book, which is a material Circumstance, never to be neglected by some Authors.

Clarke versus *Smith.*

Hill. 10 & 11 W. III. Rot. 1257. C. B.

Lincoln, ff. IN a Special Verdict in Ejectment, the Case was:

ff. John Smithson was seized in Fee of the Lands in Question, being Copyhold, and surrendred the same to the Use of himself and his Wife for Life, and after their Decease, then to the Use of such Person or Persons to whom he should devise the same, and for Want of such Devise, to his own right Heirs.

Then comes the Will by which the Testator devised the Lands to his Wife for Life; and after her Decease to his next Heir at Law, and his Heirs for ever, provided, That such Heirs paid 100 l. after the Death of his Wife, as she should direct.

The Testator had Issue Johanna his only Daughter, who married Andrew Smith, by whom she had Issue John Smith, who died without Issue in the Life-time of his Father.

That Francis Smith the Defendant, was the Heir of the said John Smith on the Father's Side, viz. his Father's Brother.

That the Plaintiffs were his Heirs on the Mother's Side, viz. the Daughters of Walter Smithson, who was Brother to his Grandfather, Uncle to his Mother, and Great Uncle to him.

The

The Question was, Whether John Smith the Grandson took these Lands by Descent or by Purchase? For if he took by Purchase, then the Defendant being his Uncle by the Father's Side is his Heir, and hath a good Title; but if he took by Descent, then the Plaintiffs hap a Title, being the Daughters of his Great Uncle as aforesaid.

And this depended upon the Construction of this Will, and therefore it was argued for the Plaintiff, That the Proviso made no Alteration in the Estate of the Land; for it was neither a Limitation nor a Condition, it could not be the one, because there was no Devise over; nor the other, because it was devised to the heir at Law; and by consequence, if it had been a Condition it had been void; because it descends to the Heir; and for that Reason if it should be broken, no Body can take Advantage of the Forfeiture; it must therefore be a Charge in Equity upon the Land, which doth not alter the Descent.

Some Cases were cited to prove this, and first the Case of *Hainsworth* and *Pretty*; 'tis reported in several Books, and is thus, *ff.* A Man devised 20*l.* a-piece to his younger Children, and his Lands to his eldest Son, and to his Heirs; and if he did not *pay* the said Legacies, then he devised his said Lands to his younger Children: In this Case the eldest Son took by Descent, for the Devise to him was no more than what the Law would have given, and is therefore void as to that; but yet the Estate which he takes by Descent is limited by this Devise, *viz.* to be void upon Non-payment of the Money; for there being a Devise over to the younger Children, that makes it a Limitation. *Cro. Eliz.* 833, 919. *Noy* 51. *Moor* 644.

The Case of *Wellock* and *Hammond* is cited in *Baraston's* Case. *ff.* It was a Devise to his *eldest Son* and his Heirs, *paying* such a Sum, *&c.* to his younger Sons; otherwise that the Land should be to them and their Heirs. 3 *Rep.* 20. *b.*

So a Devise to the right Heirs of his Name and Blood, the Heir takes by Descent; and this is the Case of *Cowden* and *Clerke*. *Hob.* 29. *Moor* 860. *Style* 148.

But it was argued for the Defendant, that the Estate in the Land was altered by this Proviso, though the Payment of the Money should be a Charge upon the Land, and recoverable only in a Court of Equity; for where a Man takes by Descent, the Law gives him a pure and absolute Estate in Fee, but here he takes it with a Clog.

Now if he should take it by Descent, then suppose this Clog or Charge should be almost as much as the Lands are worth, yet he must pay it; and if so, it would be unreasonable that the Law should adjudge the Lands to satisfie the Debts of the Testator; and if they are not Assets, then he hath them not by Descent.

It is a known Case in the Law, that where-ever an Heir takes with a Charge, he has the Land by Purchase and not by Descent; therefore a Devise to his eldest Son and his Heirs, upon Condition that he pay the Testator's Debts within a Year; and if he failed, then his Executors should sell and pay, *&c.* the Heir takes by Purchase, *viz.* *Cro Car.* 161. *and not* 115. *'tis* Gilpin's *Case.*

viz. by the Deviſe, and not by Deſcent, becauſe there is a Condition annexed to it.

But it was adjudged, That this Proviſo made no alteration of the Eſtate, but that it deſcended to the Grandſon.

The Serjeant tells us what the Chief Juſtice ſaid, *viz.* That the Caſe of * *Pitt* and *Pelham* was in Point; and he bids his Reader look into and *Nota*: But certainly this muſt be a *Nota* or Admiration, That a Caſe ſo little to the Purpoſe, ſhould be affirmed to be in Point; it was thus, *ſſ.* The Teſtator being ſeized in Fee, deviſed that his Lands ſhould *be ſold* after the Deceaſe of his Wife (but doth not ſay by whom) and that ſhe ſhould diſpoſe the Money to his Relations; and made her Executrix and died; the Wife died, and her Executors ſold the Lands; it was held, that the Deviſe was void, becauſe he had not appointed who ſhould ſell the Lands.

* 2 *Jones* 25.

Eaſtcourt verſus *Weeks*.

Trin. 10 W. III. Rot. 35.

Wiltſhire, ſſ. UPON a Special Verdict in Ejectment the Caſe was:

ſſ. The Leſſors of the Plaintiff were Siſters and Coparceners of the Lands in Queſtion, which were Copyhold, and held of the Manor of Newnton; that William Weeks, the Copyholder, ſuffered the Buildings to be out of Repair, and made a Leaſe of the Lands for a Year, and ſo from Year to Year for the Term of Ten Years; that one of the Coparceners died, and that her Moiety deſcended to the other Siſter; that the ſaid William Weeks died, and that his Wife was intitled to her Free-Bench by the Cuſtom, &c. during Widowhood; and that there was another Cuſtom, viz. That if the Tenant died after Chriſtmas, and before Lady-Day, then his Executor or Adminiſtrator was to hold the Lands till Michaelmas following.

Then the ſurviving Siſter entered for a Forfeiture before the next Michaelmas after the Death of the Copyholder, the Houſe being then ruinous and not repaired.

The Queſtion was, Whether this permiſſive Waſte, and making a Leaſe of the Copyhold Lands without a Licence, were ſuch Forfeitures which determined the Intereſt in the Copyhold? For though each of thoſe Facts made a Forfeiture for which the Coparceners might have entered whilſt they were both living, yet if they will not take Advantage of it, and one of them dies, the other ſhall not enter on that Moiety, becauſe they are both but as one entire Heir; and therefore the Court held, That where Waſte is done in the Life-time of both, they muſt then enter, or 'tis too late afterwards.

There is a Right of Action and a Right of Entry: Now 'tis plain, the surviving Sister could not have an Action of Waste, for Waste done in the Life-time of both; and the Reason is the same why she cannot enter after the Death of her Sister; for 'tis not a Forfeiture nolens volens, because 'tis at the Election of the Lord, whether he will take Advantage of it or not: Now these Coparceners being as one Lord, and the Fact being done in the Life-time of both; 'tis true, if one dies the other is Heir to her Moiety, but as such shall not enter, because the Forfeiture of Waste was done when she was not compleat Heir. Latch 226. Palm. 416. 2 Cro. 301.

But Justice Powell was of a contrary Opinion; for at Common Law, all Forfeitures did descend to the Heir, except in Cases of Waste and Cessavit: Now the Reason why a Forfeiture for a Waste did not descend was, because Damages were only to be recovered in Waste before the Statute of Glocester was made, to which Damages the Heir could have no manner of Pretence.

But certainly the Serjeant must mistake the Judge, for if at Common Law, nothing could be recovered in Waste but Damages, then 'tis plain there was no Forfeiture; and where there was no Forfeiture, 'tis as plain it could not descend.

Now at Common Law there was no Forfeiture in Waste; it was given by the Statute of *Glocester*, by which the Party was enabled, not only to recover treble Damages, but the Place wasted.

In a cessavit the Forfeiture did not descend, that is, where the Tenant ceased to pay the Rent to the Heir two Years after the Death of his Ancestor; and the Reason was, Because he had Liberty to tender it at any Time before Judgment.

Before the Case of Blunden and Baugh, such a Lease as this made by a Copyholder, was a Disseisin, without any Regard whether the Lord would have it so or not; for it was a Forfeiture which determined the Estate it self, and operated as a Breach of Condition annexed to an Estate; but now since that Case, 'tis held to be a Disseisin only, at the Election of the Lord himself. Cro. Car. 302.

And though 'tis true, that in most Cases Forfeitures are at the Election of the Lord, yet when 'tis coupled with an Interest, the Election to make an Estate forfeited or not, shall descend to the Heir; for if the Law should be otherwise, it may happen that the Lessee of a Copyhold Estate may cut down all the Trees in so little a Time, that the Lord of the Manor may not have an Opportunity to enter.

Voluntary Waste was ever since the Statute of Glocester a Determination of the Estate; and so is permissive Waste at this Time, only with this Difference, That if in the last Case the Houses were repaired before Entry, 'tis then too late to take any Advantage of a Forfeiture.

Lastly he held, That it would be very hard, that the surviving Coparcener should lose this Advantage of a Forfeiture purely by the Act of God.

But the other three Judges held, That the surviving Coparcener could not take Advantage of this Forfeiture; and the Chief Justice

Justice was of Opinion, That where a Copyholder did any Act which was consistent with his Estate, though it might be a Forfeiture, yet the Lord cannot take Advantage of it at all Times; as in this Case, the making the Lease for Years of a Copyhold was a Forfeiture; but the Estate was not determined, for he is a Copyholder still; but if he had made a Feoffment or Lease for Life, there are Acts which are inconsistent with his Estate, and which absolutely determine it; and in such Case an Advantage may be taken at any Time: The Law is the same if a Copyholder will accept a Lease for Years from another.

One of the Judges cited my Lord *Coke*'s Comment on *Littl. fo.* 53. *B.* viz. That where there are two Coparceners of a Reversion, and Waste is done, and one dies, the Aunt and Niece may join in an Action of Waste; but this seems to be a strange Case, and not warranted by any of the Books quoted in the Margent there, except one, and that is in *Br.* Abridgment, *Tit.* Waste. 41.

But this must be a Mistake, for there is no such Case in the Margent; 'tis true, the Year-Book 45 *Ed.* 3. 3. is there quoted, which is abridged by my Lord *Brook*, Tit. *Waste* 41. and it was thus: *ff.* One seized in Fee made a Lease for Life, and had Issue two Daughters, and died; the Lessee commits Waste, the Lands descend to the Daughters; one of them had Issue a Daughter and died; then the Lessee committed more Waste, and the Aunt and the Niece brought an Action; and it was adjudged that they should recover the Lands and treble Damages, for the Waste done in their Time; and that the Aunt should have treble Damages alone, for the Waste done in the Time of her and her Sister.

But admitting this Case to be Law, it proves no more than that a Right shall survive to one Coparcener after the Death of the other, to recover Damages for Waste done, but not to recover the Land it self as forfeited.

Lastly, there can be no Inconvenience to Lords of Manors, if Forfeitures should not descend to their Heirs; because the Bailiffs may enter as soon as the Tenant fells Timber; and they can have but very little Encouragement in committing Waste, because in that very Instant the Trees are cut, they are Chattels vested in the Lord; and if he dies, his Executor may have an Action of Trover for them.

Whalley versus *Reed* & *Hall*.

Cooke. Trin. 8 W. III. Rot. 1442.

Newcastle upon Tyne, ff. IN a Special Verdict in Ejectment, the Case was thus, That Francis Hall being seized of a House in Fee, devised it after the Death of his Mother, to his Wife during her Widowhood, or until his eldest Son

Reynold Hall should be of Age, then to him and his Heirs, paying to his other Son Lawson Hall and to his Daughter Isabel 40 l. a-piece; and failing the said Reynold, then to come to his Son Lawson and his heirs; and failing the said Lawson, then to come to Isabel and her heirs, &c. The Money was not paid, and Reynold Hall was never required to pay it.

That the Testator died 1 Martii 1667, and that his Mother died, and his Widow married again within five Years afterwards; that the said Reynold entered upon her Marriage, and continued in Possession till 1695, (which was near twenty-eight Years) and then he conveyed it to the Lessors of the Plaintiff; and then for Non-payment of the Money Lawson entered, &c.

The first Question was, Whether the Estate of Reynold was determined upon Non-payment of the Money, and vested in Lawson in Possession?

And it was argued for him that it was not; for the Word * paying created only a Trust or Charge in Equity upon the Land; it was not a Limitation of his Estate, because there was no Devise over in Default of Payment.

* But the Word *paying* in a Will makes a *Limitation.*

Then if the Word paying doth not make a Limitation of the Estate, the Word failing will not do it; for that cannot be intended failing in Payment, but dying, because 'tis a Word which goes thro' the whole Devise to his other Children: And if the Testator had intended that failing in Payment should be a Limitation of the Estate of Reynold, he would then have appointed his second Son to pay the 40 l. to Isabel, which he had not done; so that these Words must be construed only to make a Charge in Equity on the Land, otherwise Isabel must lose her Legacy.

Therefore if by the Word failing, the Testator meant dying, which it usually signifies in the North, the Law will make this Construction, it being in a Will, That he intended a dying without Heirs of his Body, for he could not die without heirs general whilst his Brother was living.

To instance some parallel Cases: *ff.* A Man was seised in Fee of a House, and had Issue a Son and three Daughters; he devised this House to his Son after the Death of his Mother, and if his Daughters survived their Brother and *his Heirs*, then to his said Daughters for Life, Remainder over: In this Case, by those Words, *viz.* If they survive their Brother and *his Heirs*, the Brother had an Estate-Tail; for *Heirs* there must be intended *Heirs of his Body*, for his Sisters were collateral Heirs; and this is the Case of *Noble* and *Herring.* 2 *Cro.* 415.

So a Devise to a Man and his Heirs; and for Want of *Heirs of him*, then over to another; these Words make an Estate-Tail, for it shall be intended *Heirs of his Body.* *Parker* versus *Thacker.* 3 *Lev.* and not 2 *Lev.* 70, 71.

Now admitting the eldest Son took by Descent, then as this Case is, he did not forfeit his Estate by Non-payment of the Money, because 'tis not found by the Verdict that he had Notice of the Will; and he is not bound to take Notice of it himself, for that would be very much to his Disadvantage, because he hath a better

Title by Descent than he can have by the Will; and therefore his Case is different from that of a Stranger, who as he takes Notice what Estate is given to him by a Will, so likewise he is bound to take Notice upon what Terms or Condition 'tis given.

8 Rep. 92.
1 Mod. 87.

Now tho' the Jury have found such Circumstances, yet it may be presumed the eldest Son had Notice of the Will, viz. That he entered into the House after the Death of his Mother, &c. yet this is only Fact, which is to be determined by them, and not by the Court.

Cart. 170.

'Tis true, the Case of Randal and Eeley seems to be an Authority that Notice is not necessary: If. The Testator having four Sons, devised the Land to his eldest, and to the Heirs males of his Body, upon Condition, that if he married a Wife, not having 1000 l. Portion, then he devised it to his other Sons and their Heirs: The eldest married a Woman who had not that Portion; and it was held, that he forfeited his Estate, and that Notice was not necessary to be given of the Will.

But this Judgment was founded upon a plain Mistake of the third Resolution in France's Case; which was thus:

If. The Father made his Will, and afterwards conveyed his Estate by Feoffment to his eldest Son for sixty Years, if he so long lived, Remainder to another for Life, Remainder over; Provided if his eldest Son disturbed his Executors in taking away the Goods in his House, that his Estate should cease: It was resolved, that the eldest Son should not lose his Estate without Notice of the Proviso and of the Will, because he had a good Estate cast upon him by Law, viz. by Descent; and was therefore a Stranger both to the Will and Feoffment.

Now this Case was objected by the Counsel, who argued for the Defendant in Randal and Eeley's Case, to prove that the eldest Son had not forfeited his Estate without Notice of the Will; but my Lord Bridgman in his Argument did mistake it; for he tells us, that it was resolved Notice was necessary, because the Estate was limited by Deed to the eldest Son; and that he ought to have Notice of the Will, because that was collateral to his Title by the Deed, when in Truth both that and the Will were collateral to his Title by Descent; and that was the true Reason why he ought to have Notice of both.

But if these Points should be against the Plaintiff, 'tis too late for the second Brother to enter, because he is barred by the Statute of Limitations, not having made an Entry within twenty Years after his Title accrewed; for that commenced immediately upon the Marriage of his elder Brother without a Portion, which was in the Year 1671: Now allowing that he did not pay the Money within two Years afterwards, viz. in the Year 1673, and the elder Brother continuing in Possession till 1696, there are 21 Years past after his Title of Entry did accrew, and therefore he is now barred by that Statute; and as this Verdict is found, the Plaintiff shall take Advantage of it, because there is no Disability found in the Defendant to prevent its Operation; and if 'tis not found, it shall not be presumed.

On the other Side it was argued, That the Word paying must of Neceſſity make a Limitation of the Eſtate, otherwiſe the Legatees could have no Manner of Remedy for the 40l. Legacies; and that the Word failing muſt extend as well to failing in Payment, as failing of Heirs.

Then as to Notice; it cannot be preſumed but that the eldeſt Son was ſufficiently appriſed of the Will, becauſe he entered ſo long after the Death of his Father: And no Perſon was appointed to give him Notice, becauſe it muſt naturally be intended that the Son ſhould be better acquainted with his Father's Affairs than a Stranger; and that no Advantage can be taken of the Statute of Limitations, except it had been pleaded, or ſpecially found.

But Judgment was given for the Plaintiff, and for this Reaſon only, viz. becauſe the Verdict had not found that the eldeſt Son had Notice of the Will: That France's Caſe was good Law, and that there was no material Difference between that Caſe and this at Bar.

But if Notice had been found, then the Eſtate of the eldeſt Son had been determined by not paying the Money, becauſe the Word failing muſt extend as well to the Non-payment of the Money, as dying without Heirs; and that the Plaintiff could not take Advantage of the Statute of Limitations, except it had been pleaded or found.

Laſtly, This was held to be an Eſtate-Tail in the eldeſt Son, with a Remainder in Tail to his Children.

Broughton verſus *Langley*.

Trin. 12 W. III. Rot 464. B. R.

York, ff. IN a Special Verdict in Ejectment, the Caſe was: ff. Robert Ramſden, the Grandfather of the Plaintiff, being ſeized in Fee, &c. deviſed the Lands to John Stancliffe, and to his ſecond Son Robert Ramſden, and their Heirs; that they and the Survivor of them and his Heirs ſhould ſtand and be ſeized thereof to the Uſes following, viz. That they ſhould permit George Ramſden (who was his youngeſt Son) to receive the Rents and Profits for Life; and after his Deceaſe, that they ſhould ſtand and be ſeized thereof to the Uſe of the Heirs of the Body of the ſaid George, with Remainder over to John Ramſden, eldeſt Son of the Teſtator: Provided that if George married a Wife with 100l. Portion, or more, that then the Truſtees and he ſhould have Power to make her a Jointure for every hundred Pounds, during her Life; and afterwards to the Heirs of the Body of the ſaid George, upon ſuch Wife, &c.

That

That George entered after the Death of his Father, and ſuffered a Common Recovery to the Uſe of himſelf and his Heirs, and then conveyed the Lands to the Defendant and died, leaving Jane John Ramſden the younger, the Leſſor of the Plaintiff.

The Queſtion was, Whether the Eſtate in Law remained in the Deviſees, Stancliffe and Ramſden, as a Truſt for George, or whether it was actually veſted in him by the Statute of * Uſes? For if the Uſe was executed in him by the Statute, then he was Tenant in Tail by the Will, it being that he ſhould take the Profits for Life, Remainder to the Heirs of his Body; and then the Recovery is well ſuffered.

* 27 H. 1. cap. 10.

It was argued that the Eſtate in Law was in the Truſtees as a Truſt only for George, becauſe it was limited to them and the Survivor, by which it appears, that the Teſtator intended them an Eſtate which ſhould ſurvive; they had Power likewiſe to make a Jointure for his Wife; which they could not do, if the Eſtate was not in them.

That as to this Purpoſe there is a great Difference between a Deed and a Will; for where a Feoffment is made to a Man and his Heirs without any Conſideration, and 'tis not expreſſed for what Uſe, it ſhall be intended for the Uſe of the Feoffor and his Heirs; for there an Eſtate is immediately executed in the Deviſee, without expreſſing to what Uſe.

'Tis true, a Man may deviſe an Eſtate to one to the Uſe of another and his Heirs, and the Uſe ſhall be executed in the Deviſee; but then it muſt appear by the Will that the Teſtator ſo intended it.

But in the principal Caſe it ſhall not be executed in the Deviſee, for 'tis merely a Truſt and no more; and for an Authority in Point, there was a † Caſe lately adjudged in the Exchequer-Chamber, which was thus: ſſ. The Teſtator deviſed Lands, *&c.* to *John Higden* and his Heirs, *upon Truſt to permit* Robert Durdant *to receive the Profits for Life*: And after his Deceaſe, he deviſed the Lands to the Heirs males of the Body of *R. Durdant now living*, and to ſuch other Heirs which he ſhould afterwards have of his Body; and for Want of ſuch Heirs, to *Gideon Durdant* and the Heirs of his Body.

† 2 Vent. 311.

Robert had Iſſue *George*, who had Iſſue *William*, the Leſſor of the Plaintiff; and it was adjudged that this was only a *Truſt* for *Robert Durdant*, and that the Eſtate did not execute in him by the Statute of Uſes, but remained in *Higden*, becauſe he was *to permit Robert* only to receive the Profits.

But it was agreed on the other Side, that at Common Law there was no Difference between a Truſt and an Uſe, and that one is defined to be the other, viz. An Uſe is defined to be a Truſt, for the Ceſtui que Uſe, to receive the Profits, &c. which is the ſame as if the Land it ſelf had been deviſed.

That a Truſt to permit one to receive the Profits was an Uſe before the making the Statute, and therefore muſt be executed by it.

'Tis

'Tis no Objection to say, That it doth not appear the Testator intended the Use should be executed in George Ramsden; 'tis true, his Intention shall be observed in creating an Use; but when once 'tis raised, it shall be governed by Operation of Law; and therefore my Lord Hale, in Pybus and Mitford's Case, was of Opinion, That if a Man covenants to stand seised to the Use of himself for Life, and afterwards to the Use of the Heirs males of his Body, by this he may intend no more than an Estate for Life, but the Law governs his Intention, and makes it an Estate Tail in him. 1 Vent. 379.

Now though the Trustees and George Ramsden had Power to make a Jointure to his Wife; yet it cannot be inferred from thence, that he had only an Estate for Life; for such a Power is not inconsistent with an Estate Tail; probably the Power might be given on purpose to prevent the docking an Entail; because Tenant in Tail himself, so long as he remains so, cannot make a Jointure without discontinuing the Tail, or suffering a Recovery; or it may be given to prevent an hasty and inconsiderate Match, for the Jointure is to be made in Proportion to the Fortune of the Wife.

As to the Case of Butcher and Durdant, the Point was not much debated, whether an Use was executed in Robert by the Statute; the Question in that Case was, Whether the Devise to the Heirs Males of the Body of Robert now living, &c. was a Remainder vested or contingent in his Son George, who was then alive? And it was held to be a sufficient Description of his Person, and that he took by Purchase, and not by Descent; and by consequence the Remainder was vested in him; so that whether it was an Use or not, was quite besides the Case.

Therefore Judgment was given, That the Use was well executed in George Ramsden in his Life-time, for the Reasons above-mentioned; and that if it should be otherwise, then the Remainder limited to the Heirs of his Body, could never take Effect by way of Use executed; which of necessity it must, because there is no Colour to make it a Trust in them; and so the Defendant had Judgment.

Entry.

William Lord *Sandys* verſus *Edmond Bray.*

Trin 13 Eliz. Rot. 1567. C. B.

THE Lord Sandys brought a Writ of Entry againſt Edmond Bray, for the Manor of Eyton, One hundred Meſſuages, three Mills, ten Pigeon-Houſes, Three thouſand Acres of Land, &c. in Bedfordſhire, in which the ſaid Edmond had no Right of Entry, unleſs per Sir Edmond Bray, who diſſeiſed the Demandant.

The Declaration was, That Sir John Zouch being ſeized of the ſaid Manor in Fee, did in Eaſter Term 11° H. 7. levy a Fine thereof to the Biſhop of Lincoln, and to Sir Reginald Bray, Sir William Hoddy, and Humfrey Coningsby and others, to the Uſe of Sir Reginald Bray and his Heirs; who 21° Aprilis 12 H. 7. deviſed the Premiſſes to the Uſe of his Nephew Edmond Bray in Tail male; and for default of ſuch Iſſue, to Margaret Sandys, the Wife of Sir William Sandys, (who was Niece to the Teſtator) and to the Heirs of her Body lawfully to be begotten, Remainder to her own Right Heirs.

That all the Cognizees in the ſaid Fine died, and that the Manor deſcended to Lawrence Smith, who was Heir at Law to the ſaid Biſhop, who was ſeized thereof to the Uſe of the ſaid Edmond Bray.

That the ſaid Edmond made a Feoffment of the ſaid Manor to Sir William Gaſcoigne and others, and died, leaving Iſſue John Lord Bray, who died without Iſſue male.

That after his Death, one Juſtinian Fewter entered as Heir at Law to the Biſhop, for the Uſe of the Demandant William Lord Sandys, who was Heir of the Body of the ſaid Margaret; and who by Vertue of the Statute for transferring Uſes into Poſſeſſion, was ſeized of an Eſtate Tail, of and in the ſaid Manor, until he was diſſeiſed by the ſaid Sir Edmond Bray, who made a Feoffment to the Tenant.

Upon Non diſſeiſivit pleaded, the Jury found a Special Verdict, viz. That Juſtinian Fewter, Anno 3 Eliz. entered into Part of the Manor of Eyton, in the Name of the whole, for and in the Name of

of Humphry Coningsby, one of the Conuzees in the Fine, if he should be then the Survivor of them.

They find the like Entry made by him for the Heirs of the Bishop, if he should survive the rest; and that Anno 4 Eliz. he entered, &c. in the Name of the Heir of the said Bishop, and for and in the Name of the Heirs of the surviving Cognizee.

Then petunt adviſamentum Curiæ, whether any of theſe Entries was ſufficient to veſt a Freehold in any of the Heirs of the ſaid Conuzees, for the Uſe of the Demandant; and if it did, then they find that Sir Edmond Bray diſſeiſed him.

The Serjeant tells us, he had *all this* out of a Manuſcript of Juſtice *Warburton* his old Friend, and ſeems to put an *Emphaſis* upon thoſe Words *tout ceo*, as if there was ſomething more than ordinary in the Caſe; and truly ſo there is, for as 'tis ſcarce intelligible, ſo it would be of very little Uſe if underſtood; for 'tis an Action which is now quite out of Uſe. 'Tis true, the Form of it is ſtill preſerved in Common Recoveries; but the Writ is never proſecuted to obtain Poſſeſſion, ſince the Remedy by Ejectment hath been in Practice.

He might as well have tranſcribed ſome long Proceedings in Writs of Entry *in conſimili caſu*, or *in caſu proviſo*, or *ſine aſſenſu capituli*, or in any other obſolete real Actions, which might have ſerved to no other Purpoſe than to enlarge the Book.

I muſt agree with him, that I think this is a very ſtrange Verdict, and therefore I wonder the more, why he ſhould take ſo much Pains to ſearch the Rolls to know the Event of it; for though he found the Record with Difficulty, yet I think 'tis of very little Uſe when found, for we are told, that the Verdict was inſufficient; and that a *Venire facias de novo* was awarded, and the Demandant had Judgment by Confeſſion.

Holford verſus *Brome.*

Cheſter, ſſ. THIS was a Writ of Entry in the Quibus, directed to the Sheriff of Cheſter, for one Meſſuage, Mill, Pidgeon-Houſe, and ſeveral Lands in Plumleigh, de Quibus the Demandant was diſſeiſed.

The Tenant pleaded, That Sir Hugh Cholmley ſuffered a Common Recovery in the Court of the County Palatine of Cheſter, to the Uſe of Chriſtopher Holford and his Heirs; who died, leaving Iſſue Mary, his only Daughter and Heir, who was married to Hugh Cholmley; and that after the Death of the ſaid Holford, the Premiſſes deſcended to her; and then the Husband and Wife demiſed it to the Tenant Brome during his Life, &c.

The Demandant replied, That before the ſaid Recovery was ſuffered, one Thomas Holford, and Jane his Wife, and the aforeſaid Chriſtopher Holford, were ſeized of the Premiſſes in Fee, and being ſo

seized, they levied a Fine thereof before the Chief Justice of Chester, to one Warren, to the Use of Thomas Holford for Life, Remainder to the Use of Christopher Holford in Tail male, Remainder to George Holford the Demandant in Tail male, Remainder to the first Son of the Body of the said Thomas Holford, and to the Heirs Males of the Body of such first Son lawfully issuing; Remainder in Fee to the said * Christopher Holford.

* In 2 Rep. 50. the Remainder in Fee is limited to *Thomas Holford*.

† In 2 Rep. 'tis to be void upon tender of 20 *s.* to *Warren* or the Queen; at the Rolls Chapel.

That Thomas Holford died, and Christopher entered; that George Holford the now Demandant, did by Bargain and Sale enrolled, convey the Premisses to John Bruen, for and during the Life of the said Christopher Holford; Remainder to the Queen in Fee, with a † Proviso to be void upon the Payment or Tender of 30 *s.* by the said George or his Heirs, to the aforesaid John Bruen, or his Heirs, at St. Dunstan's Church.

That afterwards the said Sir Hugh Cholmley, suffered the aforesaid Recovery, as the Tenant had set forth in his Plea in Bar, and that the said Christopher Holford died without Issue; upon whose Death the Queen was seized in Fee.

That George Holford the Demandant, paid the 30 *s.* to Bruen, which was found by Inquisition taken by Commissioners for that Purpose; and so sets forth his Right, and prayed an amoveas manus.

The Attorney General, Sir Gilbert Gerrard, confessed the whole Matter; and thereupon Judgment was given quod manus Dominæ Reginæ amoveantur; and a Writ issued to the Earl of Leicester, who was then Chamberlain of Chester, to command the Escheator amovere manus Reginæ; and thereupon the Demandant entered as into his Remainder.

The Tenant rejoins, and confessed that the said Fine was levied, and the Uses thereof were declared as above mentioned, before the Common Recovery was suffered; and that Thomas and Christopher were seized in Tail male, Remainder to the Demandant in Tail male, but saith, That before the said Demandant made the Bargain and Sale to Bruen, he made another Conveyance of the Premisses to John Warren, for the Life of the said Christopher, Remainder to the Queen in Fee; who by Letters Patents, granted the Premisses to Christopher Holford in Fee, who before the Bargain and Sale to Bruen, made a Feoffment thereof to Sir Hugh Cholmley, &c. who suffered the Common Recovery to the Use of the said Christopher Holford, and his Heirs.

That the said Christopher died seized; and that the Lands descended to his Daughter Mary, the Wife of Hugh Cholmley, and that the Husband and Wife demised the Premisses to Brome the Tenant, for and during his Natural Life.

The Pleadings in this Case are very long, and taken out of the old Magazine which has been so very useful to magnify the Volume, I mean out of Justice *Warburton*'s Manuscript; but I find the Serjeant did not altogether rely upon that Manuscript; for he tells us, That he had seen the Record it self; but I cannot imagine to what Purpose; for though it might have served for a Precedent in Queen

Elizabeth's Days, (when the Caſe happened) yet it cannot be of any Uſe now, becauſe very few of theſe Actions have been brought ſince her Reign; and they are now wholly diſuſed, ſince the uſual Way to recover Mens Rights is by the plain and common Way of Ejectment.

But ſince the Pleadings in theſe real Actions are ſo very long, and the Serjeant having given us more than a Taſte of a Writ of Entry in the *Per*, and another in the *Quibus*, I think he ſhould have ſearched a little further, either in Juſtice *Warburton*'s, or ſome other old and uſeleſs Manuſcript, and obliged his Reader with a Writ of Entry in the *Per & Cui*, and with another in the *Poſt*; which might have been a conſiderable Addition to the Book, tho' to as little Purpoſe as the reſt.

But this I muſt ſay, That by this long Record he has plainly diſcovered the Intention of *George Holford*, (if that is any wiſe material for the Reader to know) *viz.* That he conveyed the Remainder to the Queen, on purpoſe to prevent *Chriſtopher Holford*, who was Tenant in Tail, from barring the Remainder to himſelf; and this had been very wiſely done, if it could have taken Effect.

But the Misfortune was, that it was held in * Sir Hugh Cholmley's Caſe, (which is the ſame in Effect with this) That the Remainder to the Queen was void, becauſe the particular Eſtate limited to Warren for the Life of Chriſtopher was void; for it was only a Grant of a Remainder which George Holford had, and which was impoſſible to take Effect in Poſſeſſion, during the Life of Chriſtopher, therefore the Remainder muſt of Neceſſity be void; for if Warren, who is a Party to the Deed, took nothing, the Queen, who is no Party to it, ſhall be in the ſame Caſe. * 2 Rep. 50.

But if either a Remainder in Tail, or in Fee, expectant upon an Eſtate-Tail, is well limited to the Queen; yet a Recovery ſuffered by the Tenant in Tail, ſhall bar the Entail, but not the Remainder in Fee to the Queen.

So if there is Tenant in Tail, Remainder in Tail to the Queen, Remainder in Fee to another, a Recovery ſuffered by the Tenant in Tail in Poſſeſſion ſhall bar his Eſtate-Tail and the Remainder in Fee, but ſhall not prejudice the Remainder to the Queen. 2 Rol. Abr. 393, 394.

And now to conclude this very long Caſe, there are ſome Books cited, which are to as little Purpoſe as the Precedent it ſelf: The firſt is in *Hob.* 339, and there is nothing relating to the Matter.

In *Lit. Rep.* 123, there is nothing but the bare Citation of Sir *Hugh Cholmley*'s Caſe.

And in *Moor* 752, the Caſe was: *ff.* Tenant in Tail in Poſſeſſion, and he in Reverſion granted the Eſtate to King *Edward* VI. by Bargain and Sale; but before it was enrolled, the Tenant in Tail ſuffered a Common Recovery; and the Queſtion was, Whether the Reverſion was barred? The Book tells us, it was only a Caſe made for the Reſolution of the Judges; but it doth not appear that it was ever reſolved.

Error.

Sleigh verſus *Chetham* & al.

Henley. Mich. 1 Jac. II. Rot. 96. B. R.

Derby, ſſ. THIS was a Formedon in Remainder brought for the Manor of Etwall, and for 35 Meſſuages, &c. and Lands in Etwall and Egglinton, ſetting forth, That Sir Samuel Sleigh ſettled the Premiſſes upon himſelf for Life, Remainder to Samuel Sleigh his eldeſt Son in Special Tail male, viz. to him and the Heirs males of his Body, upon the Body of Barbara Palmer iſſuing, Remainder to the ſaid Samuel Sleigh in General Tail male, Remainder to Edward Sleigh the ſecond Son in Tail male, Remainder to Sir Samuel their Father in Tail male, Remainder to Samuel and his Heirs.

That the Father and both his Sons were dead without Iſſue; and thereupon remanſit jus to the Demandant Margaret Sleigh, who married James Chetham, and to Elizabeth Sleigh, who were the Siſters and Coheirs of the ſaid Samuel Sleigh.

The Defendant pleaded in Abatement, That ſix Meſſuages, parcel. Tenementorum in Etwall, were demanded; which ſaid Meſſuages are Part of the Manor, which is likewiſe demanded; and ſo are bis petita.

There was a Demurrer to this Plea, and a Joinder in Demurrer, and Judgment againſt the Defendant, that ſhe ſhould anſwer over.

And thereupon ſhe pleaded Non-tenure as to Part, viz. That ſhe was not Tenant; and as to the other Part, ſhe pleaded, That Sir Samuel Sleigh did not make ſuch a Settlement; and thereupon they were at Iſſue; and as to the Reſidue, ſhe confeſſed the Settlement as ſet forth in the Declaration; but further ſaid, That the Sons dying without Iſſue male, Sir Samuel Sleigh their Father was thereupon ſeiſed in Fee-Tail; and being ſo ſeized, he levied a Fine of the Premiſſes, and declared the Uſes to himſelf for Life, then to the Uſe of his Wife Elizabeth Sleigh, the now Defendant, for her Life, Remainder to the right Heirs of the Conuſor; and that after his Death ſhe entered.

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The Plaintiffs reply; and as to that Part of the Plea of Non-tenure, they say, that she was Tenant, and thereupon they were at Issue; and as to the Residue, they confess, that Sir Samuel Sleigh was seized in Tail, and that he levied a Fine, and declared the Uses to himself and his Heirs, and afterwards devised the Lands to Elizabeth Sleigh his Wife, and to her Heirs, and traversed that the Fine was levied to the Uses alledged by the said Elizabeth in her Plea.

The Tenant Elizabeth Sleigh rejoined, That the Fine was levied to the Uses by her alledged in the Plea; and thereupon they were at Issue, and a venire facias awarded to try it, returnable tres Trin. at which Day she cast an Essoin de malo lecti.

The Demandants challenged the Essoin, because the Widow habet Attornatum in placito præd', and both the Essoin and Challenge were adjourned ad quinden' Hillarii, at which Day they all appeared by their Attornies; and then the Defendant demurred to the Challenge, and the Demandants joined in Demurrer: And Judgment was given that the Challenge was good, and that the Essoin was not well cast; and thereupon they pray Seisin by Default of the Tenant, and had Judgment in the Common Pleas accordingly.

And now the Tenant brought a Writ of Error in B. R. and assigned for Error, 1. That Judgment ought to be given for her upon her Plea of Bis petita.

2. That upon her Default, Judgment ought to be given quod the Plaintiffs recuperent Seisinam

3. She assigned the General Error.

4. That there was no original Writ, and she prayed a Certiorari to the Custos Brevium, to certify whether there was such a Writ filed in Easter Term, 34 Car. 2. who certified there was not; and thereupon she prayed a Scire facias to the Demandant and Tertenants, returnable Octab' Hillarii ad audiend' Record. & Process. præd'.

The Sheriff returned that one of them was dead, and that he summoned the Demandant Chetham and Margaret his Wife, and one of the Tertenants who appeared; and thereupon the Tenant assigned Errors de novo.

The Tertenant pleaded, That the Demandants did prosecute an Original 1° Martii, and that it was filed Easter Term, 32 Car. 2. and that on the 24th of May in the same Year they prosecuted a Writ of Summons against the Defendant, who prayed a Certiorari to the Custos Brevium; and he certified the Original in hæc verba, and likewise the said Writ of Summons.

And the Demandants and the Tertenant further say, That the said Demandants 27 Aprilis, 33 Car. 2. prosecuted a Writ of View, returnable tres Mich' which was nine Returns afterwards, and prayed a Certiorari to the Custos Brevium, who did likewise certify that Writ in hæc verba.

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Then upon Diminution alledged, there were several Certiorari's to certify the Imparlance and Essoines, which were omitted in the Transcript of the Records; and in nullo est Erratum pleaded, it was adjudged,

That the Plea in Abatement was insufficient, because it was not pleaded that the six Messuages were Parcel of the thirty-five Messuages, but Parcel Tenementorum præd'; which might relate as well to the Manor as to the thirty-five Messuages, and so 'tis Bis petitum.

But the chief Questions were concerning the Essoin and Challenge, and the Judgment thereon.

Now as to those Matters, tho' they are very dark Parts of the old Law, yet I do not question but Sir *Thomas Powys*, who argued in this Case, set all this obsolete Learning in a clear Light: But the Serjeant hath such an unsettled Way of reporting, that he hath made all these Things as unintelligible in his new Book as they are in the old; and therefore I will put the Argument into the best Method I can, and make it a little plainer to the Reader.

And first it was argued that the Challenge was good, because the Defendant habuit Attornatum in placito, and therefore could not be essoined her self de malo lecti: That there was no Occasion of averring that the Attorney was living, and not amotus; for if that should be allowed, then it ought to be likewise averred, that the Attorney non fuit languidus, nor in Prison, the Reason being the same in both Cases; but no Man can give an Instance of any such Entry.

'Tis true, in some Entries 'tis that the Attorney non est amotus; but those are superfluous Words: Now tho' there is no solemn Resolution in this Point, yet the Reason in parallel Cases may guide this.

1. When a Fine is pleaded, 'tis never averred that the Conuzor was either an Infant or a Lunatick.

So in Trespass, if the Defendant justifies under a Lease made before the Trespass committed, he need not averr, that the Lease is continuing; for such remote Matters, which tend to disable Persons from recovering their Rights, ought to be shewed, and never intended.

2. The second Point was, Whether a Judgment final ought to be given upon the Demurrer to the Challenge, viz. To have Seisin for Default of the Defendants appearing? Or whether it had been proper to have brought the Writ of Petit Cape, by which the Sheriff is commanded to seize the Lands after the Defendant hath once appeared, and afterwards makes Default?

And as to that, it was said, That in real Actions there is not any Judgment which could be properly called final upon one Default, except it is in a Writ of Right; nor in that Case neither, unless Issue is joined upon the mere Right: For if Default of Appearance is before Issue joined, the Judgment is quod petens recuperet Seisinam, and that the Defendant sit in misericordia; if after Issue joined, 'tis quod petens recuperet Seisinam tenendum sibi, & Hæredibus quiete de præd' (the Defendant) & Hæredibus suis in perpetuum.

Now in this last Case, the Defendant hath no Remedy but by Writ of Error; but in the other Case, if he is Tenant in Fee-Simple, he may have a Writ of Right, to recover his Lands again: If he had an Estate for Life, then he may have the Writ Quod ei deforceat; so that the seeming Difficulty implied by the Words (final Judgment) doth not effect this Case, because there is no such Thing in it.

Then the Question will be, Whether a Petit Cape ought to be awarded? Which is a proper Writ to seize the Lands after an Appearance, and then a Default made by the Defendant.

But before this Point was argued, something was said concerning Essoins, Defaults, and that which in Law is called Saver of Default.

An Essoin was defined to be an Excuse for not appearing in Court; and as there are several Excuses, so there are several Defaults in not appearing.

One is upon the Return of the Writ of Summons; and in such Case a Grand Cape issueth, commanding the Sheriff capere in manus, &c. Messuagium, &c. per visum legalium hominum; commanding him also to summon the Tenant quod sit coram Justiciariis, &c. to shew Cause why he did not appear at the Return of the Summons.

There is another Non appearance after the Tenant hath once appeared to the Action; and this is either without an Essoin cast; and then a Petit Cape issueth, commanding the Sheriff capere in manus, &c. Messuagium, &c. leaving out the Words per visum, &c. commanding him also to summon the Tenant to appear on a certain Day, ad audiendum judicium suum; and not one Word in it to shew Cause why he did not appear: And the Reason may be, because having once appeared, it may from thence be presumed that he knows better in what Manner the Action is prosecuted, than he who never appeared; and therefore upon a Default after Appearance, he is to have Judgment; but upon a Default before Appearance, he is only to shew Cause why he did not appear.

So that where there is a Default in not appearing at all, and where no Essoin is cast, there must issue Process before the Demandant can have Judgment.

But if the Tenant once appears and casts an Essoin, and afterwards makes Default in not appearing; if the Essoin is not challenged, both the Demandant and Tenant have always a Day over, and the Entry is quod habet talem diem per essoniam suam, &c. but if 'tis challenged, then 'tis either adjourned, or Judgment given: Now if the Tenant appears upon the Adjournment, and doth not maintain his Essoin, or if he demurreth to the Challenge, and 'tis adjudged against him; in either of those Cases there should be no Process awarded against him, but Judgment ought to be quod petens recuperet Seisinam; and a Petit Cape was never awarded in such Cases, for that would be not only unreasonable, but very absurd and vain in it self.

1. It would be very unreasonable that such Process should be awarded after so long a Delay, 'tis contrary to many Resolutions; and not only so, but 'tis against the express Letter of the Statute de * Essoniis, by which 'tis enacted, That no Essoin shall be where the Party once appeared by Attorney.

* 12 Ed. 2.

'Tis true, when an Essoin is cast, whether 'tis challenged or not, if the Tenant doth not appear upon the Day given by the Essoin, there ought to issue Process against him; for it may happen that he may offer some reasonable Matter to excuse his Non-appearance both Times.

Now in the principal Case the Essoin was cast and challenged, even after Issue joined, and a Venire facias awarded to try that Issue; and both the Essoin and Challenge were adjourned: And notwithstanding the Tenant had an Opportunity to come in and offer an Excuse for her Delay, yet instead thereof she demurred to the Challenge; which was still a further and frivolous Delay.

As to a Petit Cape, the Design of it is only to give the Party an Opportunity to come in and excuse his Default; which the Tenant in this Case cannot be presumed to do, because she neglected it when she had an Opportunity.

Besides, it would be unreasonable to award a Petit Cape in this Case, because the Essoin was cast without any Manner of Cause; and her Appearance at the Day to which it was adjourned, and demurring to the Challenge, was done on Purpose to excuse her first Default in not appearing: And therefore she having by this Means put her self upon the Judgment of the Court, it would be unreasonable to suffer her to make any further Excuse.

2. And as 'tis unreasonable that a Petit Cape should be awarded, so 'tis vain to do it; because when 'tis awarded, the Tenant can say nothing at the Retorn, but that her Attorney was dead, or removed, or in Prison, which she could not do in this Case, because she had confessed quod habet Attornatum; for those being the very Words and Reason of the Challenge, are confessed by her Demurrer.

It cannot be objected that she was not in Court to excuse her Default, but was there to answer the Challenge; and therefore another Process ought to issue against her, because an Essoin is of that Nature, that it cannot be adjudged on the Day in which it is cast; for it must of Necessity be adjourned, that the Tenant might have an Opportunity to shew some Cause to excuse her Default.

Now she appeared upon the Day of the Adjournment, and that per Attornatum suum; and then she demurred to the Challenge: So that by Consequence she appeared to save her Default; for so it would have been, if the Demurrer had been good.

3. It would be absurd to award a Petit Cape, because by that Writ the Party is supposed to be out of Court, viz. that he hath made a Default after Appearance; but the Tenant in this Case was always in Court per Attornatum.

2 Saund. 45.

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There are many Cases like this, which have been adjudged upon Defaults before Issue joined.

If an Essoin is cast de servitio Regis, and the Tenant doth not appear at the Day of the Adjournment, a Grand Cape shall be awarded, because he may offer something to excuse his Non-appearance; but if he appeareth, and doth not make good his Essoin, he shall lose his Land. 12 H. 4. 14. B.

In a Quare impedit the Plaintiff was essoined, and it was challenged, because habet Attornatum in placito; the Challenge was received and adjourned, because it might happen that the Attorney was amotus, &c. Now if upon the Day of Adjournment the Demandant appeareth and shews this Matter, and 'tis found for him, he shall have a Writ to the Bishop. 14 H. 4. 12.

In 21 Assisarum there is a long Case in a Formedon, almost the same in Substance with this, but there was no Demurrer to the Challenge, nor Issue joined; in that Case, tho' the Tenant made but one Default, yet having appeared on the Day to which the Essoin was adjourned, and it being found that he had Attornatum in placito, by whom he offered nothing to save his Default, therefore there was Judgment of Seisin against him; and this was a Case adjudged upon a Writ of Error. 21 Ass. pl. 17.

If therefore 'tis so where there is but one Default, and that before Issue joined, a fortiori it must be so after Issue joined.

There are many Cases in the Books where Judgment of Seisin hath been given for a common Default after Issue joined; as in 13 H. 4. 8. B. 3 H. 6. 2. Fitzh. Judgment 99, 129, 141, 154, 163, 196.

These Books are truly cited, but there are some Mistakes in the rest; for in *Br. Tit. Droit pl.* 7. there is nothing to this Purpose, nor in *Tit. Judgment* 151, 152. and there are not so many *Placita*'s under that Title as 228, 245, 252.

Now the principal Case is much stronger than either of those cited before, for here were all the Solemnities imaginable to save the Default of this Tenant; for here was an Issue joined, an Essoin cast, a Challenge to that Essoin, and a Demurrer to the Challenge, which was over-ruled.

The most fatal and peremptory Judgment which can be given is, upon a Default after Issue joined in a Writ of Right; and this appears by the Authorities before cited, wherein the Party hath no Remedy but by a Writ of Error: Now if the Judgment is so fatal in that Action, a fortiori it ought to be so in this, where the Party hath an easy Remedy to vacate the Judgment by another Action of the same Nature.

And to the Authorities above-mentioned the Opinion of my Lord *Dyer in my Lord Windsor's Case, where the great Doubt was, Whether the Demandant in a Writ of Right shall have Judgment of Seisin upon the Default of the Tenant? Or whether a *Petit Cape* shall be awarded? For it could not be denied, that if the Demandant had made Default, there Judgment final ought to be given for the Tenant; and the like Judgment should be given against him, if he had * Dyer 98, 103.

had made Default *after Issue joined*: Now my Lord *Dyer* seems to encline that Judgment final shall be given against the Tenant upon a Default, after he had once appeared, and before Issue joined.

* 5 *Rep.* 85. *B.* 'Tis true, this is contrary to the 3d Resolution in * *Penrin*'s Case; which is, That Judgment final shall not be given where the Tenant makes Default, and tho' 'tis after Issue joined; and the Reason given is, because he may offer something to save his Default.

But this Resolution cannot be of very great Authority, for my Lord *Coke* not only cites my Lord *Windsor*'s Case before-mentioned to prove it, which proves the quite contrary; but he is of a contrary Opinion himself in his Comment upon *Littleton* 297. *B.* where he tells us, That if the Tenant, *after Issue joined*, maketh Default, Judgment final shall be given against him, *viz. Quod petens teneat terram illam sibi & Hæredibus suis in pace versus tenentem & Hæredes suos in perpetuum.*

2 *Cro.* 35.

Reg. 114. A. A Præcipe quod reddat is no Writ of Right, and therefore more like the present Action: Now if in such a Præcipe there be an Essoin cast by the Tenant, and then the Demandant and his Attorney contrive by Fraud to file a Warrant of Attorney for the Tenant, when he really had no Attorney in Court, and this on purpose that the Demandant might have an Opportunity to shew some Reason for challenging the Essoin, and 'tis adjudged that habet Attornatum in placito; yet Judgment final shall be given against the Tenant, and he hath no Remedy but by a Writ of Deceit; which is a plain Argument that the Judgment was not erroneous; for if it had, then the legal Remedy had been by Writ of Error.

The two first Cases in the Year-Book, 1 Ed. 3. which were cited as Authorities against this Matter, prove the contrary.

1 Ed. 3. 1. ff. The first was a Writ of Right brought in the Reign of Ed. 2, and the Process being discontinued by the Death of that King, it was revived 1 Ed. 3. by a Re-summons; then the Tenant made Default, which could be no more than not appearing at the Return of the Original, and thereupon a Grand Cape issued: The Book proceeds thus, viz. It was said, That if the Tenant make Default after Issue joined, a Petit Cape shall be awarded; but it doth not appear who said it, or upon what Account.

But be it how it will, no Credit was given to what was then said; for the Book tells us, cujus contrarium utitur, and concludes with this Reason, viz. because for a Default after Issue joined, Judgment of Seisin shall be given.

The next is, ff. If the Tenant casts an Essoin, which is challenged, for that he had Attornatum in placito, and then 'tis adjourned, and the Tenant doth not appear at the Day, a Grand Cape shall issue: Now tho' this is admitted, 'tis no Proof against what has been alledged, because the Book proceeds and tells us, That if the Tenant appear and cannot save his Default, Judgment final shall be given, which is this very Case in Point.

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In 3 *H.* 4. the Counteſs of *Salisbury* brought a Writ of Dower againſt the Earl of *Kent*; who vouched the Earl of *Arundell* to Warranty, and thereupon a *Summoneas ad warrantizandum* iſſued againſt the Vouchee to appear, and the Sheriff returned *nihil habet*, then follows the Writ called *ſequatur ſub ſuo periculo*, and before the *alias ſequatur*, the Tenant caſt an Eſſoin, but made Default at the Day he ſhould have appeared; *Hill*, the King's Serjeant, inſiſted for the Demandant, That Judgment of Seiſin ſhould be given for him, becauſe the Tenant having vouched another to Warranty, and afterwards eſſoining himſelf, and not appearing at the Day to which the Eſſoin was adjourned, 'tis plain by this Default, That he could not bring in the Vouchee upon the *ſequatur*, *&c.* and therefore it would be to no Purpoſe to award a *petit cape* againſt him; but the Book is, (*viz. hoc non obſtante*) which Words ſeem to imply that though the Law was ſo, yet a *petit cape* was awarded; but there was no Reaſon given for it, and 'tis contrary to 11 *H.* 4. 72 *B.* where the Tenant vouched, and Proceſs was continued to the *ſequatur*, if the Tenant then appears, he ſhall loſe his Land; the Reaſon may be, becauſe he gave the Demandant ſuch an unneceſſary Delay, and at laſt failed to bring in the Vouchee.

3 *H.* 4. 4. *a.*

Kellw. 41. 45 *Ed.* 3. 19 *plac.* 19.

The Year-Book 9 H. 5. 12. is not at all to this Purpoſe, for there the Queſtion was only, Whether it was not too late for the Tenant to caſt an Eſſoin after Iſſue joined? And the Court was of Opinion that it was; and therefore quaſhed the Eſſoin, and awarded a petit cape; but it was, becauſe the Demandant's Counſel prayed no more, for if he had inſiſted upon Judgment final, it muſt have been given for him.

Neither is the Caſe 11 H. 4. 87. B. of any Authority as to this Matter. ſ. It was a Formedon, wherein the Lord Mayor of York demanded Cognizance of Pleas, and becauſe he failed to make out his Title, there was a Re-ſummons againſt the Tenant; and then an Attorney caſt an Eſſoin for him, who was not Attorney to the Original; the Eſſoin was adjourned to a certain Day: 'Tis true, Thirning Chief Juſtice ſaid, That if it ſhould appear the Tenant had another Attorney, this would turn to a Default, and a petit cape muſt be awarded againſt him; but others doubted of it, and therefore the Attorney who firſt eſſoined, appeared and demanded the View.

The moſt colourable Objection is, That there was no Default in the Tenant till he had demurred to the Challenge; and it was overruled, and then being out of Court he ought to be called in by a petit cape.

But though he was out of Court, it doth not follow that he ſhall be recalled by Proceſs; becauſe when the Eſſoin was adjudged to be naught, he had in Judgment of Law, done that which would not admit of any Excuſe, viz. He had failed to appear on that very Day on which the Eſſoin was caſt; for ſo he ought to do, becauſe an Eſſoin which is adjudged inſufficient, is as if there never had been any; and then he ought to appear on that Day, and the Judgment muſt now be given for Want of an Appearance at that Time.

Besides, 'tis not reasonable that the Tenant should be recalled by Process for being once out of Court; for if that should be allowed, the same Reason will hold in infinitum; for supposing such Process should issue, and the Tenant should appear and shew nothing in his own Excuse, then he is out of Court again, and so another Process must issue, and so on.

Neither can it be objected, That there was no Default in the Tenant, who appeared at the very Day to which the Essoin was adjourned; because his Appearance at that Time was only to intitle the Demandant to pray Judgment, which must have been stayed till Process had issued against him.

'Tis true, the Tenant was in Possession, which was always favoured in Law; but in former Times so many Delays were allowed in real Actions, and the Tenants made such ill Use of those Delays, that it was difficult to come at Justice, and therefore some * Statutes were made to prevent such Dilatories.

* W. 1. cap. 43. 2 Inst. 250.

As for Example, formerly if a *Præcipe* was brought against *A. B. C.* and *A.* is essoined, *B.* appears, the Essoin is adjourned, and then *A.* appears, and *B.* is essoined, which being adjourned, *B.* is essoined again, and *C.* appears, *& sic vicissim*, this is called Fourching by Essoin, for 'tis still a delaying to the Demandant, and therefore by the Law 'tis restrained to one Essoin.

There is still another Objection. II. That if this Judgment should stand, it would be prejudicial to him in Reversion; who by this Means would be barred from defending his Right.

But that cannot be in this Case, because it doth not appear that there was any Reversioner; for the Question is, Whether the Fine levied by Sir Samuel Sleigh, was to the Use of the now Tenant for her Life, Remainder to the Cognizor and his Heirs, or whether it was to the Cognizor alone in Fee?

But admitting that the Tenant hath an Estate for Life, that will not make this Judgment void; because though in such Case there would be a Reversion; yet the Demandants are Heirs to that Reversion; but if they were not, then the Tenant hath been very inconsiderate in not bringing in the Reversioner by an Aid prayer; and if he is not thus brought in, then it would be Folly in him not to come in voluntarily to save his Right, for the Demandant could not compel him to it.

Yet after all, the Mischief would not be very great, for when the Reversioner hath the Possession, he may remedy himself by another Action.

For these Reasons the Court affirmed the Judgment, but chiefly because the Tenant having cast an Essoin, and it being challenged, and he demurring to the Challenge, had by that means affirmed it, which being turned to a Default, is peremptory after Appearance; and the great Delay which had been in this Case, was another Reason for affirming the Judgment.

All that I shall say to this Case is, That 'tis the longest both for Pleading and Argument in the whole Book; and I think likewise, the

the moſt uſeleſs; for theſe Proceedings in real Actions are now quite diſuſed, and almoſt wholly ſupplied by that common and eaſy way of recovering Poſſeſſions by Ejectment.

'Tis true, ſometimes (but very rarely) a *Formedon* is brought; but when do we read of any Proceedings for above a hundred Years paſt, even in that Caſe concerning the five Eſſoins, *De ſervitio Regis*, *In terram ſanctam*, *Ultra mare*, *De malo lecti*, and *De malo veniendi?* How often do we read in any of the late Reports, or any of the Works of my Lord *Coke* himſelf, of any Tenant vouching to Warranty, and the Vouchee ſummoned and not appearing? When do we hear of the *Magnum cape ad valentiam?* Or if the Tenant doth appear and make default, when do we read any Thing of the *Petit cape?* When doth the Sheriff retorn a *Nihil habet* upon a Summons *ad warrantizandum?* And how often is the Writ *Sequatur ſub ſuo periculo* proſecuted? When doth the Reverſioner come in by a *Writ of Receipt*, and pray to defend his Title? When is there any *aid praier*, or *ſummoneas ad auxiliandum?*

Theſe were all Things requiſite to be known many Ages paſt, but are now antiquated by common Practice, and made as uſeleſs as the Writ *de expenſis Burgenſium levandis*; the Meaning of which Writ is ſo much inverted, that we have not for many Years heard of a Burrough petitioning to be exempted from ſending Members to Parliament.

I muſt confeſs, the Serjeant might have made another Volume if he had enlarged upon all the old Tenures; upon *Attornments*, *Diſcontinuances*, *Ley-gager*, *Aſſizes* and the like, and printed ſome old Precedents in Writs of *Right*, *Writs of Entry*, and *in conſimili caſu*, and at laſt obliged the Clergy with ſome Titles of *Profeſſion* and *Deraignment*, by telling the Parſons that a *juris utrum* is the higheſt Writ they can have; that the Nature and Effect of it is to recover Lands of the Church, which were aliened by their *Predeceſſors*, without *aid praier* of the Patron and Ordinary; but if ſuch Lands were ſold in the Life-time of the Incumbents themſelves, then they might have a Writ of Entry in the *per*; *cui*, or *poſt*, and not a *juris utrum*.

Then as to the Patrons, he might have told them they could not have a Writ of *darrein preſentment*, without alledging a Preſentation in their own Time; and therefore, if they ſhould be ſo negligent as to ſuffer an Uſurpation before they preſent, they loſe the Advowſon for ever.

That at Common Law, if a Perſon preſented had no manner of Right, and the Biſhop had given Inſtitution, the Preſentee could not be removed by an *Aſſize of Darrein Preſentment*; becauſe the Law preſumes the Biſhop had done Right, and protects the Incumbent, that he may quietly apply himſelf to his Spiritual Charge; but that the true Patron might recover his Advowſon by a *Writ of Right of Advowſon*, of which he was diveſted by Uſurpation.

And laſtly, as to thoſe who were dignified in the Church, he might have told us, That if they did not make a right Uſe of thoſe Lands which were given to them in *Frank almoigne*, but ſold the ſame;

the Heir of the Donor might recover them again by a Writ *contra formam collationis*, which was always brought againſt the Vendor or his Succeſſor; and upon a Recovery, there went out a *Sci. fa.* againſt the Purchaſor; and if he pleaſed, he might have given an Inſtance of ſuch a Writ brought againſt the Prior of St. *John* of *Jeruſalem*.

Theſe and ſuch other Matters heaped together, might have made an elaborate, but a very uſeleſs Volume, as uſeleſs as this long Caſe of *Chetham* aud *Sleigh*, which is neither diverting or inſtructive to the Reader, and which is very inſignificant as to a Precedent; for as the like hath not happened for ſome Ages paſt, ſo 'tis probable it may never happen again.

Hodge verſus *Nicholas*.

WRIT of Error in the Exchequer-Chamber, upon a Judgment in B. R. wherein the Plaintiff in the Original Action, declared upon Articles of Copartnerſhip, mentioned to be made between him and the Defendant Hodges and his Wife, in the Trade of a Man's Tailor for four Years, by which Teſtatum exiſtit, that they were jointly to have the Shop and Cutting Room in the Defendant's Houſe; and that the Defendants covenanted, That after the Expiration of the ſaid four Years, they would not ſollicit or ask any of the Cuſtomers for their Work, nor make or procure to be made, any Cloaths for them or their Servants; nor work themſelves at the Trade, but would endeavour to turn over the Trade to the Plaintiff; and that during the Copartnerſhip, they would caſt up their Shop-Books at every Chriſtmas, and ballance their Accompts.

They farther covenanted, Not to contract any Debt without the Conſent of each other.

The Plaintiff aſſigned ſeveral Breaches.

ſſ. 1. That the Defendants had not ſuffered, but hindered him to uſe the Trade in their Houſe.

2. That they had not ſuffered him to have the Uſe of the Shop.

3. That after the four Years were expired, they ſollicited ſeveral Cuſtomers (naming them) for their Work, and had alſo worked for them at the Trade.

4. That they had not endeavoured to transfer to the Plaintiff, but that he had loſt ſeveral Cuſtomers.

5. That the Defendant's Wife had taken away ſeveral Books relating to the Trade, which he refuſed to re-deliver to the Plaintiff to peruſe, but detained them from him at ſeveral Times, &c.

6. That the Defendants during the Copartnerſhip, had contracted a Debt of 100 l. with one Humes, without the Conſent of the Plaintiff; for which the ſaid Defendant was ſued, and Judgment was obtained againſt him by Confeſſion, and upon a Si. fa. the Goods of the Plaintiff were taken in Execution.

The Defendants by their Plea, deny ſome of theſe Matters, and thereupon they were at Iſſue, and the Plaintiff had a Verdict; and as to ſome of the Breaches, viz.

That the Defendants had ſollicited for the Cuſtom; and had not endeavoured to turn over the Trade; and had taken and detained the Books: They deny all, and tender ſeveral Iſſues; to which the Plaintiff demurred, and the Defendants join in Demurrer; and the Plaintiff had Judgment for Part.

And now the Counſel for the Plaintiff in Error, took theſe Exceptions.

1. That 'tis not averred in the Declaration, That the Articles were made between the Parties therein named; for 'tis only ſaid, That they are mentioned to be made between the Parties, which is no Averment that they were ſo made.

2. Some of the Breaches are upon Covenants in which the Wife covenanted, &c. and ſhe being a Feme-Covert, her Covenants are void.

3. The Breach alledged, That the Defendants hindered the Plaintiff, &c. is inſufficient, becauſe he doth not ſhew how he was hindered.

But theſe and ſeveral other frivolous Exceptions were over-ruled; only upon the Demurrer to the Breach of ſollicting the Cuſtomers, the Defendant had Judgment.

But this wants ſome explaining, for I cannot find but the Words in the Plea, and in the Breach are the ſame, *viz.* the Breach is, That the Defendants after the Partnerſhip ended did, and each of them did, *intercede and ſollicit* my Lord *Herbert* and other Perſons, who were Cuſtomers, (during the Partnerſhip) for their Work and Cuſtom.

To which the Defendants made this Anſwer in their Plea, *viz.* That they did not after the Partnerſhip *ſollicit* (but left out the Word intercede) the Lord *Herbert*, or any other Perſon, *prout* in the Breach: Now certainly the Word *ſollicit* imports *interceding* and more; and therefore this ſeems to be a frivolous Exception.

Then as to that Breach, where 'tis ſaid, That the Defendant and his Wife, after the Partnerſhip ended, had worked for Charles Lord Herbert and others, who were Cuſtomers during the Partnerſhip; the Defendant denied it in the very Terms of the Breach, and tendered an Iſſue thus. ſſ. & de hoc ſimiliter ponit ſe ſuper patriam, but did not enter it thus, & præd' the Plaintiff ſimiliter, for which Reaſon the Plaintiff demurred, but the Defendants had Judgment as to that Matter.

Then as to the Breach wherein 'tis alledged, That the Defendants had not endeavoured to turn over their Trade; they ſay they were never required, but as to that the Plaintiff had Judgment.

And laſtly, As to the taking away the Books; the Defendants ſay, That the Plaintiff might have peruſed them, and that they were not detained from him, and tender an Iſſue; but did not enter it & præd' (the Plaintiff) ſimiliter; and upon Demurrer the Plaintiff had Judgment as to that.

And now upon a Writ of Error brought, the Book tells us, there were no Exceptions taken to these two last Judgments.

And I think 'tis not material, whether those or any Exceptions had either been moved or reported in this Case, for I must appeal to the Reader, Whether he can find in any Book (except this) such a long, confused and intricate Pleading.

'Tis almost impossible for him to have any manner of Benefit, by reading so many impertinent Exceptions: 'Tis true, they were made by Serjeant *Levinz*, who must offer something in behalf of his Client; but they were such which he did not think worth the mentioning in his own Report.

This was a Case wherein there was not one Book cited, nor is there any Thing in it, which looks either like Reason or Argument; the Serjeant himself confesses that 'tis very prolix, but withal tells us by way of Excuse; That there are many useful Covenants in it, which I would have the Reader find if he can.

Now most of these Covenants are between the Plaintiff and the Defendant and *his Wife*, and certainly it must be a very useful Covenant which can bind a Feme-Covert, and especially a Tailor's Wife as this was.

But since I have mentioned Tailors, I think these Articles and Covenants may be of some Use to them; for they concern their Trade, and are longer than their Bills; but are as insignificant to a Lawyer, as those very Parchment-writings which they cut out for Measures.

Claxton versus *Swift*.

Hill. 36 & 37 Car. II. Rot. 1163. B. R.

ERROR in the Exchequer-Chamber, of a Judgment obtained in B. R. the Case was thus: The Plaintiff brought an Action of Debt upon a Bill of Exchange, setting forth the Custom of Merchants, &c. and that one Hughs, who lived at Worcester, drew a Bill of 200 l. upon one Pardoe, who lived at London, payable to the Defendant Swift or his Order.

That Pardoe accepted the Bill, and Swift endorsed it to Allen, who endorsed it to the Plaintiff Claxton.

The Money not being paid by Pardoe, the Plaintiff Claxton, brought an Action against Hughs the first Drawer; and had Judgment against him, but did not take out Execution.

Afterwards he brought an Action against Swift, who was the first Endorser, who pleaded the Recovery against Hughs in Bar of the Action; and it was adjudged a good Plea by three Judges, who held it like the Case of a Trespass done by two, if a Recovery be against one,

one, and Damages paid, that shall be a good Bar to an Action brought against the other for the same Trespass.

But this was against the Opinion of the Chief Justice *Jefferies*; 3 *Mod.* 86. who held, That if the Drawer fail, the first Endorser is liable; because he had made an Endorsement on a bad Bill, and therefore 'tis Equity, that the Creditor should resort to him to make it good; and according to his Opinion, the Judgment in *B. R.* was reversed; for the Case is not like that of a Trespass done by two, but rather like that of two Debtors, which are jointly and severally bound in a Bond; for every Endorser is liable to pay the Money, it being a Sum certain, which is a Debt, though 'tis to be recovered by way of Damages.

Brown versus the Archbishop of *Canterbury*.

Mich. 35 Car. II. B. R. Rot. 672.

London, ff. WRIT of Error in the Exchequer-Chamber, upon an Action of Debt brought on a Bond of 300 l. wherein Brown, the Defendant in the Original Action, became bound to the Archbishop, That the Administrator of James Morris should truly administer, and exhibit a true Inventory of the said Intestate's Estate, and give a just Accompt of his Administration, and pay the rest of the Goods which shall be found remaining upon the Administrator's Accompt, as the Judge of the Prerogative Court should Decree, pursuant to the Intent of the Act of Distribution of Intestates Estates.

The Defendant pleaded, That the Administrator exhibited a true Inventory, &c. and that he had truly administred, and had given a just Accompt, &c. and had performed the Decrees of the Court.

The Plaintiff replies, That the Intestate was indebted to one John Herd, in 200 l. on Bond; and that Goods of the Intestate to that Value, came to the Hands of the Administrator; And then assigns the Breach, That he had not paid the said Debt.

And upon Demurrer to this Replication the Plaintiff had Judgment; and now a Writ of Error was brought, and that Judgment was reversed, because the Breach was not within the Intent or Meaning of the Condition of the Bond.

Raymond.

Raymond & al' versus *Barbon.*

Hill. 1 Jac. II. Rot. 339.

London, ss. DEBT against the Defendant upon a Sheriff's Bond, wherein the Plaintiffs declare thus, *ss.* Queruntur de *Nicho' Barbon* in medicinis doctor alias *dicto Nicho'um Barbon* in medicinis *doctorem* de placito quod reddat', &c. and upon Demurrer to this Declaration the Defendant had Judgment in B. R. for this false Latin, but upon Error brought in the Exchequer-Chamber, that Judgment was reversed upon these Authorities.—

ss. False *Latin* will not vitiate a Writ, Declaration, Plea, nor an Indictment; which ought to be more certain than all the rest.

2 *Saund.* 38. First as to a Writ. *ss.* There was a *quod ei deforceat* brought against two Tenants, and it was *quod reddat'*; and upon Demurrer this was held good.

* 10 *Rep.* 133. *a.* In * *Osborne*'s Case it was held, That false or incongruous *Latin* will not vitiate a Plea or Grant; and as to an Indictment for Murder, the Word † *Manilla* was wrote with a single *m*, and that was held good.

† 5 *Rep.* Long's *Case.* So where the Declaration was by the Sheriffs of *London*, *de placito quod reddat ei*, this was held to be well enough, because the Court knows that one Sheriff there is two Persons; besides, 'tis but a Slip in the Clerk, and * amendable.

Hob. 70. 1 *Rol. Abr.* 200. * *Cro. Eliz.* 877. *Cro. Eliz.* 543. The Serjeant tells us, That a Case like the last was cited on the other Side, for the Defendant *Barbon*: In *ss. A Vo. fa.* was directed to the Sheriffs of *London*, and it was *præcipimus tibi*, and after Verdict it was moved in Arrest of Judgment for this Cause; but the Book tells us that it was amended, so that I think this is an Authority rather against the Defendant than for him.

Death versus *Serwonters.*

Hill. 1 Jac. II. Rot. 669. B. R.

London, ss. DEBT brought on a Bill of Exchange, setting forth the Custom of Merchants, viz. That if a Merchant at Venice did draw a Bill upon a Merchant in London, and it was accepted, then he became chargeable with the Contents, to the Party to whom it was directed; and if he endorsed it to another, the Acceptor was then liable to the Endorsee; and if the first Endorsee should afterwards endorse it, that the Acceptor is still liable to the second Endorsee; and if he should not pay the Money

to him, then if the second Endorsor pay it, the Acceptor is become liable to him.

That John Baptista Morelli, a Merchant in Venice, drew a Bill of Exchange for 1000 Ducats upon Death, the Defendant in the Original Action, payable to George Ebretz, which Bill the said Death accepted.

That Ebretz endorsed it for Value received to the Plaintiff Serwonters.

That Serwonters endorsed it to Adam Conrade, who likewise endorsed it to De Barry; That the Defendant Death, not paying the Money to Conrade or De Barry, the Plaintiff Serwonters paid it to Conrade; per quod the Defendant Death became chargeable to the Plaintiff.

There was a frivolous Plea to this Declaration, and upon Demurrer to it, Judgment was given for the Plaintiff in B. R. and now a Writ of Error was brought in the Exchequer-Chamber, and the Error assigned was:

1. That this is an unreasonable Custom, because the Defendant Death might be charged at the Suit of all the Endorsees.

But it was answered, That when the first Endorsor had signed the Bill, the Defendant stood no longer liable to him; and when the Plaintiff, who was the second Endorsor, had endorsed it to Conrade, the Defendant Death was no longer liable unto him; until by his paying it to Conrade, he was again intitled to receive it of Death; so that after the Plaintiff had paid the Money, none of the Endorsees had any Remedy, but the Plaintiff alone had a Right of Action against the Person upon whom the Bill was drawn, and who had accepted it.

There was another Objection, viz. That the Plaintiff had not averred that the Bill was drawn for Value received by the Drawer; but this was so frivolous that I do not find it was insisted on, and therefore Judgment was affirmed.

Grey, Executrix of *Ralph Grey*, versus *Thorowgood* & Ux' Administratrix.

Trin. 2 Jac. II. Rot. 139.

Newcastle upon Tyne, ss. DEBT by the Husband and Wife, as Administratrix de bonis non, &c. of James Briggs, brought against the Defendant as Executrix, &c. upon a Bond executed by her Testator Ralph Grey, for payment of 200 l. to the said James Briggs.

The Defendant pleaded in Bar, That the said Ralph Grey died Intestate, and that Administration of his Goods was committed to her, and that she ought to be named Administratrix, and not Executrix;

trix: There was Judgment that the Defendant should answer over, and she not appearing, Judgment final was given for the Plaintiff; which was affirmed upon a Writ of Error in the Exchequer-Chamber, because the Defendant only pleads, That Administration was committed to her, but did not * traverse that she had administred any of the Goods of the Intestate before Administration was granted to her.

* 2 Vent. 179.

Fairly versus *Roch.*

Mich. 2 Jac. II. Rot. 475.

London, ff. THIS was an Action on the Case, brought on a Bill of Exchange; setting forth the Custom amongst Merchants, & alias personas usitat. & approbat. &c. That if a Bill is drawn and endorsed, and accepted by the Person upon whom 'tis drawn, if any other Merchant pay the Money to the Endorsee for the Honour of the Endorsor, that the first Drawer is liable to him.

That Fairly, the Defendant in the Original Action, drew a Bill of Exchange upon one Ryley, for 100 l. payable to John Digby, which Bill Ryley accepted.

That Digby endorsed this Bill to one Michael Lincoln, and that Roch the Plaintiff paid it to him pro honore of Digby the Endorsor; and that thereupon the Drawer became liable to Roch, ad damnum, &c. 40 l.

The Plaintiff had Judgment by nil dicit, and Damages to 117 l. and now upon a Writ of Error brought in the Exchequer-Chamber, that Judgment was reversed, because the Custom was laid too general; for it did not extend only to Merchants, but ad alias personas, which comprehends all manner of Persons as well as Merchants.

There was another Fault, but it was not insisted on, viz. That in the Declaration the Plaintiff had laid his Damages to 40 l. and Judgment was given for 117 l. which were the Damages found upon the Writ of Enquiry.

'Tis true, this is a Fault, the Jury may find less Damages, but not more than is laid in the Declaration; for 'tis presumed the Plaintiff when he brings his Action upon the Case, knows how much he is damnified; and 'tis unreasonable the Jury in such an Action, should give more than is in the Declaration.

Glover

Glover versus *Kendall.*

Trin. 2 Jac. II. Rot. 627.

Midd. ss. DEBT upon an Escape brought against the Marshal of the King's Bench, wherein the Plaintiff declared in the *debet* & detinet, setting forth, That he, as Executor of Elizabeth Bond, had recovered 600 l. against one Farrington, and had taken him in Execution, and committed him to the Marshal, who suffered him to escape.

The Plaintiff had Judgment by nil dicit, and upon a Writ of Error brought in the Exchequer-Chamber, that Judgment was reversed; because it appeared that the Plaintiff had recovered in the first Action in the detinet as an Executor, and therefore he ought not to have brought this Action of Escape in the Debet & Detinet, because 'tis grounded on the former Record, and for that Reason it ought to be in the Debet alone. In Cro. Eliz. 326. there is a Case in Point, viz. By the Opinion of two Judges against one; it was *Hitchcock*'s Case, which is mentioned again by Justice *Croke*, in Sir *George Reynell*'s Case, and there he tells us, That the Plaintiff perceiving the Opinion of the Chief Baron *Periam* to be against him, brought a new Action in the *Detinet* only. *Savil* 130. idem. 2 *Cro.* 545. 5 *Rep.* 31. *Lane* 79.

All that can be said for the Action is, That an Escape is a Tort done to the Plaintiff himself as Executor; and an Action of Debt for that Wrong is given by a particular Statute; and therefore it may be brought in the *Debet & Detinet*; but this Inconvenience would follow, That the Demand in such Case being of a Duty due to himself, (for so it must be if 'tis in the *Debet*) then he would recover in his own Right, what is really due to the Testator; and therefore he ought to pursue the first Action, for the Escape is grounded upon it.

Robert Clerke, Mil. versus *Ambrose Isted.*

Trin. 2 Jac. II. Rot. 372.

London, ss. DEBT upon Bond, there was a Special Verdict found, in which the Case was thus.

ss. Sir Robert Clerke entered into a Bond by the Name of John Clerke, but the Condition was, That if the above bounden Robert Clerke, do pay 200 l. to one Mannings, that the Bond should be void.

Mannings died, and Ambroſe Iſted, who was his Executor, brought an Action of Debt againſt Sir Robert Clerke, ſetting forth, That he per Nomen of John Clerke entered into the Bond, and upon non eſt factum pleaded, the Jury found all this Matter; but that at the Time the Bond was ſealed, the true Name of the Defendant was Robert Clerke; and upon arguing this Verdict, the Plaintiff had Judgment in B. R. and now a Writ of Error was brought in the Exchequer-Chamber, and that Judgment was reverſed.

And it was upon theſe Authorities following:

* *Dyer* 279. B. *Owen* 48. *ſſ.* In 10 *Eliz.* one * *William Shotbolt* was bound by the Name of *John*, and an Action of Debt was brought againſt him by the Name of *William* alias dict' *John*, and upon *non eſt factum* pleaded, this Matter was found ſpecially, and the Defendant had Judgment: But the Court was of Opinion, that it had been the beſt Way for the Plaintiff to have brought the Action againſt *John Shotbolt*, as named in the Bond, *nuper dictus William Shotbolt*.

2 *Cro.* 558, 640. *in Point.*

Cro. Eliz. 897. *Anno* 44 *Eliz. James Winlow* was bound by the Name of *John*, and the Condition was, that *James* ſhould pay, *&c.* and the Action was brought againſt *James*, for that he *per Nomen* of *John* became bound; and upon Demurrer to the Declaration, the Defendant had Judgment, becauſe *James* could not be *John*.

† *Moor* 897. In † *Panton*'s Caſe, the Court held, that any Writing made by a wrong Chriſtian Name is void, becauſe no Man could be known by two Names.

2 *Brown.* 48. In 8 *Jac.* Sir *Edward Aſhfield* was bound by the Name of *Edmond*, but ſubſcribed his true Name *Edward*: An Action was brought againſt him by the Name of *Edward* alias *Edmond*, and upon *non eſt factum* pleaded, he had Judgment, becauſe a Man cannot have two Chriſtian Names.

1 *Mod.* 107. By all which Books we may ſee that a Bond made by a wrong Chriſtian Name is void; but *Jaacob* inſtead of *Jacob* is well enough.

Lewin verſus *Brunetti*.

Henley. Trin. 4 Jac. II. Rot. 185.

London, ſſ. ACTION on the Caſe upon a Bill of Exchange, ſetting forth the Cuſtom of Merchants, viz. That if a Merchant at London draw four Bills of Exchange of the ſame Date, &c. upon another at Leghorn, payable to any Merchant, or his Order; that if the firſt Bill is protеſted for Non-acceptance, then if another Merchant will give a Note under his Hand to pay the Money at the Return of the Bill, for the Honour of the Drawer; then if the ſecond Bill is endorſed to ſeveral Merchants, and the Money not paid by him on whom the Bill was firſt drawn, but the ſecond Bill ſhould be protеſted; and if any Merchant, for the Honour of the

the first Endorsor pay the Money to the last Endorsee, that then the Merchant who undertook to pay the Bill for the Honour of the Drawer, is liable to the first Endorsor to whom it was made payable.

That one Abraham Valentine drew four Bills of Exchange upon Jacob Abendano at Leghorne, for 500 Pieces of Eight, payable to Francis Brunetti at London.

That Abendano refusing to pay the Money, the Bill was protested.

Then Lewin, the Defendant, gave a Note under his Hand to pay the said Bill of Exchange at the Return thereof, for the Honour of Abraham Valentine the Drawer.

Thereupon Francis Brunetti endorsed the second Bill to Alvarez de Costa, which Bill by several Endorsements at last came to James Arges; and the said Abendano refusing to pay it, the Bill was protested.

Thereupon two Brunetti's, for the Honour of Francis Brunetti, the first Endorsor, paid the Money, (but doth not say to whom); and Francis Brunetti brought the Action against Lewin, and declares upon a Promise to pay the Money, &c.

Upon Non assumpsit pleaded, the Plaintiff had a Verdict, and Judgment; and a Writ of Error was brought in the Exchequer-Chamber; and the Error insisted on was, That the Declaration had not pursued the Custom; for that was, If any Merchant pay the Bill to the last Endorsee, for the Honour of the first Endorsor, that then he who undertook to pay the Bill for the Honour of the Drawer, is liable to the first Endorsor; and in his Declaration he had not alledged that the Money was paid to the last Endorsee, and so had not brought his Case within the Custom.

But the Judgment was affirmed, it being after a Verdict which had found the Promise; and that could not have been, except there had been Evidence at the Trial, of the Payment, &c. to the last Endorsee.

This is only a hearsay Report, which the Serjeant had *ex relatione* of his Brother *Girdler*, which, for ought I know, may be of as good Authority as Justice *Warburton*'s old Manuscript; only I must observe, that if I tell a long and impertinent Story, what another Man told me, it will not be allowed as Evidence to a Common Jury, but it may serve to prolong the Time, and so may this to enlarge the Book.

Haugh verſus *Roe.*

Mich. 5 W. & M. Rot. 248.

Yorkſhire, ſſ. ACTION on the Caſe brought upon a Bill of Exchange, ſetting forth the Cuſtom of Merchants, viz. That if ſuch a Bill is drawn, &c. the Acceptor is liable to pay it; that one Nicholas Lambretchs drew a Bill upon the Defendant, payable to the Defendant's Teſtator; that the Defendant accepted it, &c. Then the Plaintiff lays a general Promiſe to pay the Money, but had not paid it; and another Promiſe on which this Action was brought, which was thus: ſſ. Cumq; in conſ. the Teſtator at the Inſtance of the Defendant would accept him to be his Debtor, (inſtead of the Drawer) he promiſed to pay the Money.

Upon Non aſſumpſit pleaded, there was a Verdict for the Plaintiff, and Judgment, and a Writ of Error in the Exchequer-Chamber, and Judgment affirmed by the Opinion of four Judges againſt three.

The Serjeant had this Caſe from the Report of Mr. *Lindley*, who was Attorney for the Defendant; I only obſerve this, to ſhew with what Induſtry this mighty Volume is collected, *viz.* From Juſtice *Warburton's* Manuſcript, ſome from the Reports of Serjeants and Lawyers *ore tenus*, and ſome even from a lower Form of Lawyers, I mean Attornies themſelves; and it appears by the Book, that this Attorney only told the Serjeant, that the Judgment was affirmed, but he could not tell upon what Reaſons or Authorities, nor what occaſioned that different Opinion amongſt the Judges.

The Serjeant hath cited ſome Caſes which he thinks may be pertinent enough; but before I ſhall mention them, I think it may be proper to ſtate the Queſtion, which I ſuppoſe was thus:

ſſ. If a Creditor accepts a Stranger to be his Debtor, inſtead of him who really owed the Money, Whether that will be a ſufficient Conſideration to raiſe a Promiſe for the Payment of the Debt?

1 *Lev.* 262. 1 *Saund.* 210. idem.

As for Inſtance, *A.* owed Money to *B.* who aſſigned the Debt to the Plaintiff, then *A.* died, and the Plaintiff brought an Action againſt his Executor, and declared, that in Conſideration he would accept him to be his Debtor, he promiſed to pay the Debt; and upon Demurrer to this Declaration, the Defendant had Judgment, becauſe there was no Conſideration of Forbearance; it was only in Conſideration he would accept the Defendant for Debtor, which in Truth he was not; for the true Debtor is ſtill liable to the firſt Creditor.

1 *Lev.* 248. *Sid.* 396. 1 *Vent.* 9. idem. *Clipſam* verſus *Morris.*

So where *A.* owed Money to the Plaintiff, and wrote a Note to the Defendant to pay it, who promiſed, if he would take his Word for a Fortnight, to pay the Money: 'Tis true, the Plaintiff had a Verdict, but the Judgment was arreſted, becauſe there was no Conſideration ſufficient to raiſe a Promiſe, for the Defendant was not indebted to the Plaintiff.

So

So in 29 *Car.* 2. the Lord of *Oxford* owed the Plaintiff 150*l.* and the Defendant having Money enough of that Lord's in his Hands to pay the Debt, agreed with the Plaintiff, that if he would accept of 220*l.* in full Satisfaction, that then the Defendant would pay it; the Plaintiff brought an Action for the Money, and laid mutual Promiſes in the Declaration; and upon *Non aſſumpſit* pleaded, he had a Verdict, but could not get Judgment, becauſe this was no Conſideration. 2 *Jones* 87.

In *Barber*'s Caſe, the Father owed Money, and he and his Son came to this Agreement with the Plaintiff, That if he would accept the Son for his Debtor, he ſhould pay the Money: An Action was brought againſt the Son, and upon Demurrer to the Declaration, the Defendant had Judgment; for this was held to be a void Conſideration. *Raim.* 450. *Palm.* 185.

The Caſes above-mentioned may probably be ruled by the Authorities in * *Newcomen* and *Leigh*'s Caſe, which was thus: *Iſſ.* That if the Plaintiff would accept a Stranger for his Debtor, *in the Room of one Cooper*, and would not ſue till ſuch a Day; if the Money was not then paid, he promiſed to pay it: An Action was brought upon this Promiſe in an inferior Court, and the Plaintiff had Judgment; but upon a Writ of Error the Judgment was reverſed, for the Court held it to be *nudum pactum*. * *Style* 249.

Thus 'tis reported by *Style*; but Mr. *Lyndley*, who had ſeen the Record, tells us, that *Style* was miſtaken both in the Number-Roll and in the Caſe; for it was entered *Paſ.* 1650. *Rot.* 62. and not 52. and thoſe Words, *viz.* (*in the Room of Mr. Cooper*) were not in the Record, and that there was no Judgment entered on the Roll; if this is true, that Caſe is of very little Authority.

There are likewiſe ſome Books which ſeem to encline to the contrary.

As for Example, *J. S.* owed 40*l.* to the Plaintiff, and *Dittlesfield* owed the like Sum to *J. S.* who appointed the Plaintiff to receive it of *Dittlesfield*; and he in Conſideration of the Premiſſes, and that the Plaintiff would *forbear him* for a Quarter of a Year, promiſed to pay the Money: There was a Verdict for the Plaintiff, and it was moved in Arreſt of Judgment that *Dittlesfield* was no Party to the Agreement between *J. S.* and the Plaintiff, ſo that an Action would not lie againſt him; and if ſo, then *Forbearance* could be no Conſideration, for he may ſtill be ſued by *J. S.* 1 *Vent.* 153.

But my Lord *Hale* was of Opinion that the Plaintiff ſhould have Judgment, becauſe the Defendant had agreed to the transferring the Debt to him; and *J. S.* by appointing him to receive it of the Defendant, had agreed that he ſhould be diſcharged againſt him: And this differs from *Clipſam* and *Morris*'s Caſe, becauſe the Defendant in that Caſe was not at all indebted to *A.* who wrote to him to pay the Money to the Plaintiff.

In *Michaelmas* Term 16[illegible]8, *Smithſon* obtained a Judgment of my Lord *Abergavenny* for a Debt on Bond, and then he appointed the Plaintiff *Reynolds* to receive the Money; thereupon the Defendant *Hardres.* 71.

Proſſer,

Proſſer, in Conſideration the Plaintiff would *forbear* to take out Execution againſt the Lord *Abergaveny*, promiſed to pay the Money; this was held a ſufficient Conſideration, but the Book gives no Reaſon for it.

1 *Lev.* 188. 1 *Sid.* 294. idem.

So where there was Judgment againſt the Teſtator, and a Letter of Attorney made to the Plaintiff to receive the Money to his own Uſe; then the Defendant, who was Executor, promiſed, in Conſideration the Plaintiff would forbear Execution, he would pay the Money; and upon Demurrer to the Declaration, the Plaintiff had Judgment; tho' it was objected that the Defendant might have no Benefit of this Conſideration, becauſe the Plaintiff was to receive the Money by a Letter of Attorney; and a Promiſe made by him to *forbear* might ſignify little, becauſe the Creditor himſelf might ſue for the Money, notwithſtanding ſuch Promiſe.

But it was anſwered, That it ſhall not be intended that the Creditor would ſue, but rather that he had wholly aſſigned his Debt to the Plaintiff, in Satisfaction of what he owed him.

The Biſhop of *Exeter* and *Hesket*, verſus *Freake* & al.

Hill. 10 & 11 W. III. Rot. 1337. B. R.

Devonſhire, ff. QUARE impedit to preſent to the Vicaridge of Buckfaſtleigh, wherein the Plaintiff ſets forth, That Elizabeth Cabel was ſeized of the Rectory, &c. to which the ſaid Vicaridge did belong, and that ſhe preſented one Sainthill, and then conveyed the Rectory to the Plaintiff Freake and others, and their Heirs, to the Uſe of her ſelf and her Heirs, until ſhe married Cholmley Doyley, then to the Uſe of the ſaid Truſtees upon ſeveral Truſts particularly declared.

That the Marriage took Effect, &c. That the Truſtees were poſſeſſed, &c. That the Vicaridge became void by the Death of Sainthill, and ſo it belonged to them to preſent.

The Biſhop pleaded, That he claimed nothing but as Ordinary, and the Incumbent Hesket pleaded, that King James I. was ſeized of the ſaid Rectory in Fee, and that the Vicaridge being void by the Death of Langſton, he preſented one Solbear; and ſo derived a Deſcent to the King and Queen, and traverſed that Cabel was ſeized in Fee.

There was Judgment againſt the Biſhop, and the Plaintiff took Iſſue upon the Traverſe, which was tried at the Aſſizes at Exeter, and the Plaintiffs had a Verdict; and the Jury further found, that the Vicaridge was full of the Defendant Hesket, ex Præſentatione of the King, and that it was afterwards void on the 25th of December

ber 1697, by the Death of Sainthill, the laſt Incumbent; and that 20 Maii 10 W. III. the Plaintiff brought a Quare impedit againſt the Biſhop and the Defendant, and that the Vicaridge was of the yearly Value of ſixty Pounds; and thereupon the Plaintiffs pray'd Judgment according to the Statute, and a Writ to the Biſhop to remove the Defendant Hesket, and to admit another; and they likewiſe pray to have Damages, viz. the Value of the Living for half a Year; and they had Judgment accordingly.

And now a Writ of Error was brought in the Exchequer-Chamber, and the Plaintiff in Error was nonſuited.

'Tis a wonderful Thing that a learned Perſon, and one who had filled the Seat of Judicature, ſhould publiſh ſo long a Record, for no other Purpoſe than to let the World know that the Plaintiff in a Writ of Error was nonſuited; and 'tis alſo ſomething extraordinary to entertain his Reader with what he had *not* obſerved, *viz.* That he could not find in all the Entries but three Records of a Judgment in a *Quare impedit* tried *at Aſſizes*, nor any Precedent where a Judgment was given in ſuch Caſe by a Judge of *Aſſize alone.*

Two of thoſe three Records are in *Townſend*'s ſecond Book of Judgments 189, and the other is in *Aſton*'s *Entries* 449.

But why muſt we be told that there is no ſubſtantial Difference between thoſe Records and this, but only ſome ſmall Variation in Form, *viz.* That in thoſe, the Entry after the Verdict is, *Quod* (the Plaintiff) *ad dictas Aſſizas petit judicium, & ideo conſideratum eſt per Juſtitiarios ad Aſſizas, &c.* but in this it was *ſuper quo* (the Plaintiff) *inſtanter petit judicium, ideo conſideratum eſt per Curiam hic*, which muſt be intended at the Aſſizes.

I would fain know to what Purpoſe all this is printed; for if a Man ſhould ſearch all the Entries, and publiſh to the World where they differ in Form, this without any other Matter would make a very large Volume, but of no great Uſe to a Lawyer, or any other Perſon.

But I think the Serjeant hath not ſearched the Books of Entries with that exact Care he might, for if he had, he muſt neceſſarily have found more than the three Precedents which he mentions.

ſſ. In my Lord *Coke*'s Entries, *fol.* 505. *B.* between *Loveden* and *Cole*, there is a compleat Record, (if I do not miſtake) of a Judgment given in a *Quare impedit* by the Juſtices of Aſſize, and that differs likewiſe in Form from theſe Precedents; for after the Verdict, 'tis not entered that the Jury were *per Curiam quæſiti*, whether the Church was full or not, *&c*? For all that is left out of the Record; and the Entry is, *ulterius ſuper Sacramentum ſuum dicunt quod Eccleſia præd' plena exiſtit, &c.*

There is another Precedent of a Judgment alone, given by a Judge of Aſſize in a *Quare impedit*, which the Reader may ſee in my Lord *Hobart*'s Reports, *fol.* 327. who tells us, that the Judgment in *Shirley*'s Caſe was given by the Juſtices of Aſſize, and he ſets down the very Words of the Judgment; and if the Reader is ſo curious as to ſee the Record it ſelf, he may find it in *Winch*'s Entries 801; ſo that

upon the whole Matter the Serjeant hath taken ſome Pains to ſhew that he was miſtaken in his Searching.

Thurſton verſus *Slatford.*

Hill. 11 W. III. Rot. 556. B. R.

Midd. ff. WRIT of Error on a Judgment in the Common Pleas, in an Action on the Caſe brought by the Plaintiff Slatford againſt Thurſton, for the Profits of the Office of Town Clerk of Oxford.

Upon Non aſſumpſit pleaded, there was a Trial at Bar, and a Verdict for the Plaintiff.

But a Bill of Exceptions was tendered to the Court upon the Evidence given for the Plaintiff, which was ſealed by the Judges, reciting;

ff. That the Evidence for him was, that he was choſen Town-Clerk, &c. 16 Aprilis 1697, and was then admitted to the Office; that after his Admiſſion, the Defendant had received the Profits, &c. but did not ſay when; that the next Quarter-Seſſions after his Admittance was held before the Mayor and Recorder, and Juſtices ad pacem conſervand' necnon ad diverſas Felonias perpetrat. audiend' & terminand'; and this was die Jovis the 3d of May, 9 W. III. the Record of which Seſſions he gave in Evidence; in which Seſſions likewiſe the Names of thoſe Perſons who had produced Certificates of receiving the Sacrament, and who had taken the Oaths, were regiſtred, but the Plaintiff Slatford's Name was not there.

Then the next Quarter-Seſſions, &c. was held per Adjournament' a præfato die Jovis prox' poſt feſtum ſanctæ Trinitatis, to the ſecond of July; (but doth not ſay in what Year) and that it was held before the Mayor and Recorder, cuſtodibus pacis ac Juſtic' ad pacem in Civitate præd' perpetrat' audiend' & terminand aſſign', and there it appeared that Stratford had taken the Oaths, &c.

The Defendant's Counſel excepted againſt theſe Records, as not being ſufficient to prove that Slatford took the Oaths at the next Seſſions after his Admittance to the Office, as he ought; which was over-ruled by the Court, and thereupon the Plaintiff had a Verdict.

And now the general Errors were aſſigned by the Defendant, and upon in nullo eſt Erratum pleaded, it was argued that there was no Pretence that Slatford had taken the Oaths at the firſt Seſſions in May; and if ſo, the Seſſions held the 2d of July by Adjournment could not be the ſame Seſſions, tho' 'tis ſaid it was held by Adjournment, becauſe the Style of the Seſſions in May is, ff. Ad generalem Quaterial' Seſſion' Pacis, &c. and the Style of the Seſſions in July is, ff. Ad generalem Seſſion' pacis, only leaving out Quaterial'. 'Tis likewiſe

alledged to be held by Adjournment a præfato die Jovis prox. poſt feſtum Sanctæ Trinitatis uſq; 2 Julii, &c. which could not be the firſt Seſſions; for in the Style of that Seſſions, 'tis not mentioned to be held die Jovis prox. poſt feſtum, &c. but die Jovis only.

Now where-ever a ſubſequent Record hath any Reference to a former, they muſt exactly agree, and not vary in the leaſt; neither doth it appear when this ſecond Day of July was, for 'tis not ſaid in what Year, and if 'tis not in the ſame Year, 'tis void.

Beſides, the firſt Seſſions is ſaid to be held before the Mayor, Recorder and Juſtices of the Peace, necnon ad diverſas felonias perpetrat' audiend' & terminand' which is before Juſtices of Oyer and Terminer; and the adjourned Seſſions is before the Mayor and Recorder, Juſtices of the Peace ad pacem perpetrat' audiend'.

I cannot apprehend what is meant by this Sentence *ad pacem perpetrat' audiend'* there muſt be an Omiſſion of ſome Words, for I think 'tis not Senſe.

The Chief Juſtice of B. R. found Fault with the Bill of Exceptions, viz. It did not appear but that the Defendant had received the Profits of the Office, after the Plaintiff was admitted, and before the next Seſſions after ſuch Admittance to the Office; and tho' he had not qualified himſelf at that Seſſions, ſo that for the Time to come, his Office would be ipſo facto void; yet till he made Default ſo to qualifie himſelf within Time, he was a compleat Officer by his Admiſſion, and muſt remain ſo till the next Seſſions, though he was not qualified; and by Conſequence had a Right to receive the Profits, for which the Plaintiff had a Verdict; and for this Reaſon the Judgment was affirmed without any Conſideration had of the Bill of Exceptions.

But becauſe we ſhould not loſe what was ſaid of this Bill of Exceptions, the Serjeant tells us, That the Seſſions held 2 *Julii*, could not be by Adjournment from the Seſſions 3 *Maii*, becauſe the Style of one is *ad generalem quarterial' Seſſion' pacis*, and the Style of the other is *ad generalem Seſſion, pacis:* Now every Quarter Seſſions is a General Seſſions of the Peace; but every General Seſſions is not a Quarterly Seſſions: The other Objections are the ſame as in the Bill of Exceptions.

False Imprisonment.

Dennis versus *Rowls* & al'.

Winford. Trin. 3 Jac. II. Rot. 489.

Glouceſter, ſſ. IN an Action of falſe Impriſonment.

The Defendant pleaded, That the Caſtle and Manor of St. Bravell, was an antient Caſtle and Manor; and ſo preſcribes to have a Court there every Week, to be held before the Conſtable or his Deputy, & duobus ſectatoribus, for the Trial of all perſonal Actions, &c.

That a Plaint was levied there at a Court held before the Deputy and two Suitors, & diverſis aliis ſectatoribus, &c. and that Taliter proceſſum fuit (without ſetting forth any Declaration or Appearance) that the Plaintiff had Judgment; and that the Defendant was taken in Execution, and delivered to the Gaoler, where he was detained till he paid the Debt, &c.

And upon Demurrer to this Plea the Plaintiff had Judgment, becauſe the Record in the inferior Court, was recited only by taliter proceſſum fuit.

Beſides, the Defendant preſcribes to have a Court there, held before the Conſtable or Deputy, and two Suitors; and the Court ſet forth in the Plea was held before the Deputy and two Suitors, and divers other Suitors, which is larger than the Preſcription.

George Fowler verſus *Holmes* & al'.

Trin. 4 Jac. II. Rot. 1786.

York, ſſ. TRESPASS for an Aſſault, Battery and Falſe Impriſonment; and detaining the Plaintiff in Priſon till he paid ten Pounds.

The Defendants as to all, beſides the Aſſault, Battery and Falſe Impriſonment, plead Not guilty; and as to that they juſtifie by Vertue of a Warrant upon an Attachment of Privilege, &c. That the Plaintiff was arreſted and impriſoned by the Defendant Holmes,

and that the other Defendants, who were called to assist him, molliter manus imposuerunt on the Plaintiff, lest he should escape, quæ est eadem Insult', and traverse the Assault at any Time before the Warrant delivered, or after the Return of the Attachment.

There was another Assault and Imprisonment laid in the Declaration for 40 Hours, &c.

And as to that, the Defendants pleaded, That the Plaintiff was outlawed, and that a Capias utlagatum was prosecuted against præd' Johannem Fowler, whereas his true Name was George; and so justify by Vertue of a Warrant upon a Capias utlagatum: And upon Demurrer to this Plea,

The Serjeant tells us, this Case was argued *once*, *viz.* In *Trin.* 4. *Jac.* 2. and that there was a Rule for an *ulterius Concilium*, but it was not put in the Paper in ten Terms afterwards; so that he believes it was argued no more, and I believe so too; for this Case happened a little before the Revolution, which so terrified some of the long Robe, and probably those who were of Counsel in this Cause, that they might not compose their Thoughts for a second Argument in all that Time.

But I would fain know to what Purpose 'tis to acquaint the Reader that this Case was argued but once, or whether 'tis material for him to be informed that a Rule was made for another Argument: These are such Impertinencies that they are scarce worth any Man's Notice, therefore I think the Serjeant might have spared this Digression; and if so, I should also have spared this just Reflection.

But as to the Case it self, it seems these Exceptions were taken to the Plea, when 'twas argued.

1. Exception, If. That the Defendants had not answered the detaining the Plaintiff until he paid 10.

I do not find that any Books were cited by the Plaintiff's Counsel to maintain this Exception; but the Serjeant hath found out some, which he thinks may be to the Purpose.

If. In 3 *H.* 4. 8. *&* 9. There was an Action of Trespass brought for an Assault, Beating and Imprisonment, until the Plaintiff had paid a Fine of 40 *s.* to the Defendant.

Skreen, who was Counsel for the said Defendant, pleaded, as to the *beating and taking the Fine*, Not guilty; and as to the Assault, that the Defendant had a Mill on such a River, which the Plaintiff would have stopped, and the Defendant took him by the Arm and hindered him, *&c.*

My * Lord *Brook*, who had seen the Manuscript Report of this King's Reign, tells us, in abridging this Case, that this was a good Plea; by which we are to infer, that the Plea in the principal Case is not good, because in this Case the Defendant had answered the taking the Fine, *viz.* he pleaded Not guilty to it.

* *Br. Tresp.* 79.

In 19 *H.* 6. 35. *A.* the Defendant in the like Case justified the Imprisonment, but said nothing as to the taking the Fine; Serjeant *Markham*, who was Counsel for the Plaintiff, asked the other Side what they said to the *taking the Fine*; thereupon they perceiving their Mistake, pleaded Not guilty to that.

In 35 H. 6. 44, 45. in the very like Case, the Defendant justified the Imprisonment generally, but did not traverse it donec the Plaintiff paid the Fine; and this was held a good Plea; for if he had traversed the Imprisonment until the Plaintiff had a Fine, that would have been a Denial of what he had justified before, viz. the Imprisonment, which is the very Gist of the Action, and the donec is only an Aggrabation, and consequential to the Imprisonment.

2 Mod. 195.

So where Creepals was brought against John Sampson, for that he simul cum Georgio Francis took and detained the Plaintiff's Cattle quousq; he paid a Fine of 11 l. to them.

2 Vent. 93.

The Defendant Sampson justified the taking by Vertue of an Execution, &c. and the detaining quousq; the Plaintiff had paid the 11 l. to the other Defendant for the Use of the Sheriff.

'Tis true, this Plea was held ill upon a Demurrer, but not for the Reason mentioned by the Serjeant, which is, that the Detainer should have been alledged until he had paid the Money to the Plaintiff in the original Action, and not till he had paid it to *Francis for the Use of the Sheriff*.

But the Reason why that Plea was held to be ill was, because *Sampson*, one of the Defendants, had justified the *detaining*, &c. but did not answer that Part of the Declaration, wherein 'tis alledged that he detained the Cattle till the Money was paid to *himself*.

And this was the true Reason of that Judgment; for as to the Matter, two of the Judges held, that Payment to *Francis to the Use of the Sheriff* was well enough, because he has a special Property in the Goods taken in Execution; and therefore Payment to his Use must be intended, that he may have it in Court, as the Writ commands, and that it would be a strained Construction to take it to be for his own proper Use.

* *Fol.* 158. *B. pl.* 4.

The Serjeant introduces a Case in *Theolall, Digest of* * *Writs*, with a *But*, which must signify that it differs from the Cases above mentioned:—ff. The Writ was for several Extortions and *Oppressions*, and the Declaration was for Extortions and *Grievances*; and yet it was held good, and certainly with a great deal of Reason; for there is no Manner of Variance between the Writ and Declaration; the Terms are convertible, and they answer each other; and there can be no Variance between them, unless the Serjeant can maintain that *Grievances* are not *Oppressions*; and he must be a *magnus Apollo*, who can shew any great Learning, Judgment and Ability in such a Case.

2. Exception, ff. The other Exception was, That the Defendant had set forth a Capias utlagatum against præd John Fowler, whose true Name was George, and to be was named before in that very Plea.

Now I do not believe the Serjeant can cite any Case to prove that *Robert* can be *Richard in Terminis*, or which is the same Thing, that *John* can be *George*; and therefore the Nicety must lie in the Participle *præd*.

Then

Then we must thus argue. *ff.* This Outlawry cannot be against *prædict' John Fowler*, because *John* was not mentioned before; therefore if that Word *prædict'* has any Signification in this Place, it must relate to *George*, who was named right throughout the whole Pleadings, except in this one Place; and if so, *John* must be rejected, and *George* intended. 1 *Lev.* 428, 450. *Telv.* 182.

Many Instances may be given, where a superfluous Word has been rejected in Declarations, on purpose to support the Action.

As where a Man declared for three Years Tithes of twenty Acres, *de quibus quidem triginta acris* no Tithes were set out; the Plaintiff had a Verdict, and this being thought to be a Fault, there was a Motion made to amend it, but the Court held it well enough; and that the Word *triginta* was Surplusage, and then the Sentence would be, *de quibus quidem acris* no Tithes were set out, which is sensible enough. *Sid.* 135.

So in the Principal Case, there being no such Person as *John* named before, 'tis therefore void, and then *prædict' Fowler* will be sufficient.

Patrick versus *Johnson* & al'.

Hill. 5 W. & M. Rot. 302. C. B.

Suffolk, ff. THIS was an Action of Assault, Battery and Wounding, *&c.*

The Defendant as to the Wounding, pleads Not guilty; and as to the rest he justifies by Vertue of a Ca. Sa. against the Plaintiff, &c. and that the said Defendant Molliter manus imposuit on him to arrest him, and that he did take and imprison him; quæ quidem mollis impositio manuum, &c. is the same of which the Plaintiff complained.

There was a frivolous Replication, and upon Demurrer to it, there was a plausible Objection made against this Plea. *ff.* That *Molliter manus imponere was too gentle and tender a Justification for a Battery. * So adjudged in *Stony* and *Calvert's* Case. Hill. 2 W. 3. Rot. 759. in C. B.

But Serjeant Levinz, who reports this very Case in his 3 Part, fo. 403. seems to wonder, that the Court should so much as incline to hold such an Exception good; for he tells us all Justifications in such Cases are so; and that even Molliter manus imponere is a Battery, if the Defendant hath nothing to offer as an Excuse for so doing.

The Serjeant (to shew that his Brother *Levinz* was mistaken) has cited some Precedents, where such Justifications are not good without pleading Not guilty to the Battery.

In *Coke's Entries*, 303. the Plea was Not guilty, as to the Force, *& So is Aston* *necnon vitam transgressionem, &c.* which must include the *Battery*, 369.

other-

otherwise the Serjeant is mistaken, for the Battery is not particularly answered in that Precedent.

2 Cro. 251. In *Thompson's Entries*, 316. *plac.* 31. the Plea is somewhat fuller, for 'tis Not guilty as to the Force, *seu quicquid quod est contra pacem, necnon verberationem*, &c. so there the Battery is particularly answered.

And to shew that this is no new Doctrine, the Year-Book 2 *Ed.* 4. 6. *B.* was cited. *ff.* There was an Action of Assault and *Battery* brought, *&c.* and the Defendant justified by Vertue of a Plaint out of the Compter, *&c.* and that the Plaintiff was taken and rescued, and that he could not be retaken without *beating* him; so there likewise the Battery was answered.

In Cro. Eliz. 93. there is a Judgment in Point. ff. It was an Action of Assault, Battery and Wounding, &c. the Defendant justified by a Molliter manus imposuit, and my Lord Coke took this very Exception, That the Battery was not answered; and for that Reason the Plea was held ill.

And so it was held in Carr and Donn's Case, 2 Vent. 193.

The Reader may perceive that two Things are asserted by Serjeant *Levinz*, in his Report of the Principal Case.

1. That all Justifications in *Assault* and *Battery*, *&c.* are as this is, which hath been sufficiently confuted by those Precedents and Cases above-mentioned.

2. That *Molliter manus imponere* is a Battery, if the Defendant hath nothing to excuse himself, and this I think confutes it self; for 'tis such an Absurdity, that no Man in his Senses can believe; it may amount in a legal Understanding to an Assault, but it cannot in common Sense, be stretched to a Battery.

And now the Serjeant hath put us upon the Search; for he tells us, The Current of Precedents (notwithstanding what hath been said) are as this is, but names none; only he is of Opinion, That the Case in the Year Book 21 H. 7. 21. strongly resembles this Case.

Before I mention it, I must acquaint the Reader, that it was no more than a Dialogue between Justice *Kingsmill* and *Rede*, the King's Serjeant; for by the way he was not Chief Justice at that Time, and not till the Year following; so that I think in that the Serjeant was mistaken by calling him Chief Justice.

The Case and Dialogue was thus. *ff.* The Action was for an Assault and Battery; the Defendant being a Constable, justified for that the Plaintiff assaulted another Person; and that he to keep the Peace *molliter manus imposuit*, *&c.* and thereupon the Plaintiff assaulted him, *&c.*

Serjeant *Rede* objected that this Plea was double, *viz.* A Justification as Constable to keep the Peace, and then a Defence of his own Person.

But the Judge *Kingsmill*, would not allow this Exception; for the Defendant could not plead that the Plaintiff made the first Assault, and so justifie in his own Defence, for that would have been false, because

because *molliter manus imposuit* on the Plaintiff first, and therefore he ought to alledge both these Matters in his Plea, which he had done, and yet 'tis single and entire.

Serjeant *Rede* replied, It might be so, if the Plaintiff had declared for a *Wounding* as well as a *Battery*, because he could not answer that, without alledging that the Plaintiff first assaulted him; but that was not this Case, therefore he ought only to plead, that *Molliter manus imposuit*, which is the same Assault, *&c.* and this seemed to him to be a good Justification, both of the Assault and Battery: To which Justice *Kingsmill* replied, That suppose after such a Plea *quod molliter manus imposuit*, the Plaintiff should reply, That the Defendant did beat him.

Serjeant *Rede* answered, Then the Defendant must rejoin and say, *Son assault Demesne*; and this is all the Case, which I have set forth at length; that the Reader may judge whether it makes so strongly for the principal Case, as the Serjeant would have it.

We are farther told, That neither of these Ways are good Pleading, unless warranted by Precedents, of which the Serjeant himself tells us the far greater Number are as this is; and yet he advises his Reader *In tanta varietate opinionum quærere meliorem*; but I cannot see any manner of Reason for this Search; for if most of the Precedents are as this is, it must be safe to follow them; but if there are a few where the Battery is answered by a Plea of Not guilty, or otherwise in a more particular Manner, 'tis an easy Matter to do it, which I think would be the surer way of Pleading to prevent this Exception.

Justification by Process out of an Inferior Court.

THE next Case is a Plea of four Defendants, without Name, Term, Court or Number-Roll.

ff. Two of them plead Not guilty to all, &c. and one of them as to the Assault, Beating and Imprisonment, justifies by Vertue of a Process out of an inferior Court, held 31 Martii, &c. and traversed that he was guilty at London, or at any Time before the said 31 Martii.

Another of them pleads Not guilty as to all, besides the Assault, &c. and as to that he pleads, That the Plaintiff was arrested by Vertue of that Process, by another of the Defendants, and delivered to him (being the Gaoler) who took him into his Custody, and detained him in Prison till he was delivered by a Habeas Corpus, quæ sunt eadem, &c. and traversed that he was Guilty at London, &c. or at any Time before the carrying the Plaintiff to Prison, or after he was delivered from thence.

Justification in False Imprisonment.

ff. THE next is a Plea of two Defendants, but without Name, Term, Court or Number-Roll.

ff. They both plead Not guilty as to all, and then as to the Taking, Imprisoning and Detaining the Plaintiff; there they both justifie by Vertue of an Execution for Costs, upon a Nonsuit in Ejectment brought in the Exchequer, quæ sunt eadem captio, Imprisonament', &c.

This Plea was held to be repugnant, because the Defendants had both pleaded Not guilty, as to any Assault; and yet they both justified the taking the Plaintiff by an Execution, which they ought not to do; but they should have put the Assault under the Justification, and concluded quod est idem insult', &c.

Gwinne versus *Pool*, Ar. & al'.

Mich. 4 W. & M. in Scac.

ff. TRESPASS for an Assault, Battery and False Imprisonment, brought both against the Judge and Officer of an inferior Court, and against the Plaintiff in the Action there.

All the Defendants plead Not guilty as to the Force, and as to the rest they justifie; setting forth, That a Plaint was levied in an inferior Court, by the Defendant as Administrator, &c. against the now Plaintiff for a Debt of 20 l. (but did not alledge that the Cause of Action did arise within the Jurisdiction of that Court) then they set forth the Process awarded against the Plaintiff, and the Delivery thereof to the Defendant Jones, being Serjeant at Mace, who arrested the Plaintiff, and made a Return of his Writ; quæ est eadem, &c.

The Plaintiff replied, That the Cause of Action did arise extra the Jurisdiction of that Court; and traversed, That it did arise infra Jurisdictionem, &c. And upon Demurrer, Judgment was given for all the Defendants, that this Action did not lie against any of them. It did not lie against the Judge, for he was upon his Oath to do Justice, and was not bound ex officio to take Notice where the Cause of Action did arise.

It could not lie against the Officer, for he is bound to obey; and 'tis a certain Rule, That he cannot be a Trespasser in what he doth, by Vertue of any Warrant issuing out of that Court where he is an Officer; for if he should, it would be impossible to maintain these inferior Courts, without an inevitable Ruin both to Judge and Officer;

cer; because any Man may enter Plaints in those Courts, for Causes which in Truth do not arise within their Jurisdiction; and so subject them to infinite Actions, if they do not take Notice of it themselves.

Besides, as to the Judge, 'tis a known Rule in Law, That an Action will not lie against him but where there is a plain Defect of Jurisdiction; for he is not to be punished for what he doth in his judicial Capacity, though 'tis erroneous, especially where he hath an original Jurisdiction of the Cause; and therefore an Action will not lie against a Sheriff for taking insufficient Bail, because the Law hath made him a proper Judge of the Sufficiency of the Persons. Justice *Powell*'s Argument. 12 Rep. 25. Hut. 120. 1 Rol. Rep. 264.

'Tis true, some Actions of this Nature have of late been attempted; as for Instance. ſſ. The Mayor and Recorder fined a Grand Jury-Man, for not finding a Riot upon plain Evidence, and contrary to the Direction of the Judge; and committed him for not paying the Fine; and in an Action of False Imprisonment this Commitment was held illegal, and Sir William Jones moving for Time to plead, my Lord Hale told him, That the Action would not lie, because what the Court did, was in a Course of Justice; and in such Case, it would be unreasonable to punish them for an illegal Commitment, as it would be to punish them for an Error in their Judgment. 1 Mod. 19. 184.

Then as to the Officer, he shall not be liable to an Action for executing an erroneous Precept of a Judge, who hath a proper Jurisdiction of the Cause; as if there is a Capias against a Peer, the Sheriff is excusable; so if a Justice of Peace makes a Warrant to apprehend a Man for Felony before he is indicted, such a Warrant (as the Law was formerly) is erroneous, but the Constable shall not be punished for executing it; neither shall he be punished for executing a Warrant of a Justice of Peace, on a Person charged to work on the Highways, though he was never summoned to answer. 2 Levinz. Web *versus* Batchelour.

So where a Ca. sa. issued out of an inferior Court to take the Principal, and if he could not be found, then to arrest the Bail; and the Officer took the Bail, yet no Action lies against him; though there could not be any Custom to justifie such an irregular Process. And this was *Seaborne* and *Savaker*'s Case; there should have been a *Capias* against the Principal, and then a *Sci. fa.* against the Bail. Now if that Case is Law, as certainly it is, then it will be a vain Objection to say, That the Defendant in the principal Case hath justified by a Capias without a Summons; which an Officer of an inferior Court cannot do, because 'tis a Course of Proceeding not to be supported by any Custom. 2 *Rol. Abr.* 560.

But after all, 'tis no more than an erroneous Process, for which the Officer is not to be accountable.

'Tis true, my Lord Chief Justice *Hale* was of a contrary Opinion. ſſ. That an inferior Court cannot award Process of *Capias*, but upon a *Summons* first returned; for if they should, then a Man might be held to Bail for every trivial Matter; and because a Process *inverso ordine* 1 *Vent* 220.

ordine is aided by Appearance, and therefore it can never be assigned for Error upon a Writ of Error brought; this made it seem reasonable to that Judge, that an Action of False Imprisonment should lie against the Officer for executing such Process.

But this was a sudden and not a convincing Judgment, it was pronounced upon the very first Argument, without citing any Authority to support it; and though we are farther told by that great Person, that an Officer cannot justifie the executing an Attachment out of an inferior Court, without a Plaint first levied, yet in * Savage and Knight's Case, 'tis only held to be Error; and 'tis no more for a Capias to issue before a Summons.

* 4 Leon. 78. 2 Cro. 261. Palm. 449. 2 Rol. Abr. 277.

It seems very strange, that a Man of his Learning should affirm, That if an Officer executes any Process out of the Courts at Westminster, without an Original, he should be excusable; and yet if an Officer of an inferior Court, executes a Process without a Summons, he shall be punished; this would be to make such Under-Officers to be Men of more Understanding than those in the Superior Courts; and that they might be better able to make a right Judgment of what Process is lawful for them to execute, and what not: But the true Reason why they are not liable to an Action is, because the Judge had an Original Jurisdiction of the subject Matter, and the Officers are only Ministers, and must not dispute, but obey his Precepts.

If the Law is so where an erroneous Process is executed, the next Thing to be considered is, How it is for executing a void Process, as this was alledged to be; for the Capias was returnable † ad proximam Curiam, without mentioning any certain Day; so that the Imprisonment of the Defendant must be indefinite, viz. until it please the Steward to call a Court; and so it was held in * Smith and John's Case.

† A *Ve. fa. ad prox' Cur'* is ill, 1 Mod. 81.

* 2 Cro. 314. 2 Bulst. 36.

But a Process returnable ad proximam Curiam is not void, because there is no certain Day observed for keeping the Court; and therefore Continuance ad proximam Curiam was held good; but yet if the Days were certain, 'tis only Error in Process, and shall excuse the Officer.

Cro. Car. 254.

But admitting it to be void, the Officer is still excusable: 'Tis true, the Case of Martin and Marshall is otherwise. ff. It was an Action of False Imprisonment, the Defendant justified, for that in the City of York, there was a Court of Chancery for all Causes of Equity arising within that City; and that the Mayor had used to direct Precepts, &c. to Persons to appear, and to commit them for Contempt of Orders, &c. and so justifies the Imprisonment by a Command from the Mayor, for not obeying an Order; and upon Demurrer my Lord Hobart tells us, That Judgment was given against the Defendant, because he had laid the Prescription in the Mayor to direct Precepts, &c. which must be intended in Writing, and then alledges that the Plaintiff was taken by a Command from the Mayor ore tenus which is void.

Hob. 63. 2 Rol. Rep. 109.

My

My Lord Rolle, who reports the same Case, gives us another Reason for that Judgment. ℔. It was because the Defendant did not aver, That the Matter in Controversie did arise within the Jurisdiction of the Court; but this was not the true Reason, for it was for Want of Jurisdiction in the Court as to the Process.

There is a great Difference between a Command ore tenus, and a Precept in writing to arrest the Defendant; for where 'tis ore tenus the Arrest is void, except you tell the Defendant on what Day the next Court will be held, that he may then appear to make his Defence; but where 'tis in Writing, and returnable ad prox' Curiam, 'tis no more then an erroneous Process, but not void. 2 Cro. 571. Dyer 262.

If so, then the chief Question will be, Whether a Judge or Officer is liable to an Action, for proceeding in a Cause, or executing Process in Causes arising out of the Jurisdiction of the Court?

And as to this 'tis to be considered, That some Jurisdictions are limited to the subject Matter it self; as the Commissioners of Excise have Power to lay Impositions on Strong-Waters; and therefore if they adjudge Low-Wines to be Strong-Waters, they exceed their Jurisdiction; and 'tis void, for they may as well adjudge Milk-water to be so. Hardr. 480.

This was the Reason of the Judgment in the Case of the Marshalsea, which Court had formerly Jurisdiction only in Cases of Debt and Covenant, arising between both Parties living within the Verge; and in Trespass where one of them lived in the Verge; and therefore it did not extend to a Trespass on the Case. 10 Rep. 75; 77.

So where a Founder of an Eleemosynary Corporation appoints a Visitor, and limits his Power by certain Statutes and Rules, if he exceed those Rules, an Action lies against him; but not if he is mistaken in any of them; and yet in such Case there lies no Appeal.

There are other Jurisdictions which are limited in respect to the Persons; as in the Case of the Marshalsea aforesaid, viz. where an Action of Debt or Covenant is brought, both the Plaintiff and Defendant must live within the Verge; but if an Action of Trespass, then 'tis sufficient if either of them live there; and if this is not observed, the Judgment is coram non judice.

There are some Jurisdictions limited to the Place, and such is that of Justices of Peace concerning the Confirmation of Poor-Rates, which must be made for the Relief of the poor in those Parishes where they live; where they may send Warrants to distrain in Case of Non-payment, but not those who live in one Parish for the Relief of the Poor in another; for if they do, they are liable to an Action: And so are all inferior Judges and Officers of Courts and Corporations, where they proceed in any Case which may reasonably appear to them not to be within their Jurisdiction; but 'tis otherwise where it cannot plainly appear to them to be so. Cro. Car. 394.

As for Instance, in the Case of the Marshalsea, which is a Court for the King's Houshold, and where all his Servants are, or should be enrolled: It must be an apparent Fault in the Judge or Officer,

to meddle with any Persons who are not within the Verge, when they can have so easy a Recourse to the Roll.

But in the principal Case the Court had a Jurisdiction of the Action, for it was in Debt, which is transitory in its Nature, and by Supposition of Law arises in all Places, because a Debt is so every where.

'Tis true, it did not actually arise within the Jurisdiction of the Court, as it ought to intitle them to hold Plea of it; but neither the Judge or Officer could know it, except by the Confession of the Plaintiff or Defendant, and until 'tis known, ignorantia facti excusat.

If it appear in the Declaration, that the Cause of Action did arise extra jurisdictionem, then all the Proceedings are coram non judice; and that was the Reason of the Judgment in * Richardson and Bernard's Case, where in the Declaration it self it appeared, That the Bond was made in the Body of the County, & extra jurisdictionem of the Court of Kingston upon Hull.

* March 8. 1 Rol. Abr. 545, 809.

But where it doth not appear in the Declaration, it must be shewed in the Plea to the Jurisdiction, &c. which if the Court refuse, being tendered before Imparlance, and sworn, or if they accept such Plea, and proceed afterwards, 'tis all void, and both Judge and Officer are liable to an Action.

And this appears by the Statute of W. 1. which prohibits inferior Courts to proceed in Contracts, Covenants and Trespasses out of their Jurisdiction, and gives double Damages to the Party grieved; and Writs of Prohibition and Actions have been framed on this Statute, both before and after the Suit commenced.

W. 1. c. 35.

Those before the Suit are to prohibit that the Party should not be arrested contrary to the Statute; those after the Suit are to recover double Damages for the Arrest.

My Lord Coke, in his Comment on this Statute saith, That if the Party pleads to the Action, he concludes himself, and shall have no Advantage of that Act; for he ought to plead the Special Matter, viz. to the Jurisdiction, &c. and so by that Means to take Advantage of it.

This Sentence is scarce intelligible, but I think the Serjeant hath mistaken my Lord *Coke*, as well as the Folio, for 'tis in 2 *Inst.* 230. and not in 130. and his Words are. *ff.* That the Party may waive the Benefit of the Statute, by pleading in Bar to the Jurisdiction of the Court, but if he will have any Advantage of it, he must plead the Special Matter.

The Courts at Westminster never grant Prohibitions to inferior Courts, upon bare Suggestions that the Cause of Action did arise extra jurisdictionem, &c. but still after a Plea to the Jurisdiction.

1 Mod. 63. Sid. 464.

Some Attempts have been made to the contrary, but still overruled; and 'tis generally held, that there must be a Plea to the Jurisdiction before, but not after an Imparlance; but all the Books agree, That until such Plea is pleaded, the Proceedings are not void; for how can it be said that a Judge exceeds his Jurisdiction,

22 Assise, plac. 64. 22 Ed. 4. 31.

before

before he is informed by the Plea where the Cause of Action doth arise?

The Case of Ollyot and Belfy and the principal Case fall under the same Reason. ſſ. It was an Action of False Imprisonment brought against the Defendant, who was a Gaoler within a Franchise; the Arrest was made by his Deputy out of the Franchise, which was unknown to the Gaoler; but he received the Prisoner and kept him in Custody: 'Tis true, the Plaintiff had Judgment, but it was reversed, because he being not privy to the Wrong, it was unreasonable to punish him for doing his Duty.

In Mich. 35 Car II. B. R. an Action was brought in an inferior Court for suing the Plaintiff in the Marshalsea, for a Cause arising extra Jurisdictionem; and there it was held, that the Officer was excusable. Hudson *versus* Cooke.

'Tis true, where Actions are brought in inferiour Courts, *the Plaintiff* must always entitle such Court to a Jurisdiction, by shewing that the Cause did arise *infra Jurisdictionem*; but where a Justification is made of a supposed Trespass, under any Warrant or Judgment given in such Court, all the Proceedings there shall be intended regular, until the Contrary is shewed; and therefore when the Defendant justified by a Warrant out of the Court of Admiralty, and did not aver that it was for a Maritime Cause, the Justification is good; and it was my Lord *Hale*'s Opinion, That 'tis sufficient to shew the Warrant, which the Officer is bound to obey, and is not obliged to shew that the Cause of Action did arise *infra Jurisdictionem*. 2 *Lev.* 131. *Moor* 847.

If therefore the Action doth not lie against the Judge or Officer, it will not lie against the Party who was Plaintiff in the inferiour Court, because he sued for a Debt, which was transitory in its Nature, and he may not understand where the Cause of such Action did arise; for a Bond may be sealed to his Use, and sufficiently attested, and afterwards sent to him; so likewise Money may be received for his Use, of which he may have Notice by Letter; and 'tis not material for him where the Bond was executed, or in what Place the Money was paid, especially if he live at a great Distance; and 'tis a weak Objection to say, that it shall be presumed he knows where the Cause of Action arises, and it would be very hard to make him a Wrong-doer upon such a Presumption.

Besides, the Plaintiff was an Administrator, and therefore is supposed not to know where the Cause of Action doth arise.

'Tis true, he is bound to take Notice where there are Bona notabilia, but that is not like this Case; yet if he should administer in an inferior Diocess, that doth not subject him to an Action; the Administration is only void for Want of Jurisdiction; but in this Case, the Court hath a Jurisdiction until 'tis defeated by a Plea; but when once the Defendant hath pleaded, then all the Proceedings are good, and cannot be avoided in a collateral Action, or by Writ of Error, especially if the Plaintiff hath alledged that the Cause did arise infra Jurisdictionem; for if he pleads any other Plea besides to the Jurisdiction, he shall never afterwards assign the Want of Jurisdiction to

to be Error in Fact, because 'tis contrary to the Record; for by his Plea he hath affirmed the Jurisdiction.

1 Rol. Abr. 759. 1 Mod. 81. 'Tis true, the Case of Lea and Ceely seems to be otherwise, but that is not Law; for it hath since been ruled that 'tis not assignable for Error.

There may be another Reason why an Action will not lie against the Plaintiff, which is, That he may not know the Extent of an inferior Jurisdiction; the Boundaries are Matter of Fact only known to the Officers, and ignorantia facti will be an Excuse where ignorantia juris will not.

If the Plaintiff had commenced this Suit, knowing that the Cause of Action did not arise within the Jurisdiction, it may be a Question even in such Case, whether he is punishable merely for that Reason, because it was a Proceeding in a Course of Justice, and the Court prima facie seems to have a Jurisdiction till 'tis divested of it by a Plea.

And therefore where an Attorney brought an Action against the Defendant for suing him in an inferior Court, knowing him to be an Attorney of the Common Pleas, my Lord Hale was of Opinion that it would not lie, because the Defendant might not know that the Attorney would insist upon his Privilege; for if he would, he must plead it; so in this Case 'tis probable the Defendant might submit to the Jurisdiction; and if not, he should have pleaded to it.

'Tis a common Thing for Plaintiffs to sue in inferiour Courts, tho' they know the Cause of Action did arise extra Jurisdictionem; and the great Abuses in such Courts by usurping Powers, to which they had no Right, might provoke Men to invent new Remedies to restrain them.

My Lord Hale himself was moved by this Practice of issuing a Capias before a Summons, which made him give that Judgment above-mentioned; for otherwise the injured Person could have no Remedy; because a Capias before a Summons was only an Error in Process, which was aided by Appearance of the Defendant; and it could not be assigned for Error after Judgment.

These Courts have usurped a Jurisdiction in all transitory Actions, tho' the Causes do arise extra Jurisdictionem; and this might be the Occasion that the Courts in Westminster have given Countenance to this new Action against Plaintiffs in these Courts below; but the publick Good is more to be regarded than the Enlargement of the Jurisdiction of those superiour Courts; for if a Plaintiff in an inferiour Court should be punished for suing there, because his Action did arise extra Jurisdictionem, then Men must sue for little Debts in the Courts above; and there the Remedy for a little Debt would be ineffectual, because tho' the Plaintiff should recover, yet he loses his Debt in his Attorney's Bill, where 'tis swallowed up, and often more.

As 'tis a constant Practice for these Courts to issue a Capias without a Summons, so 'tis a fraudulent Practice amongst them to have

a set Number of Attornies, who take an Oath not to plead any foreign Plea, which they wilfully mistake to be a Plea to the Jurisdiction; and thus they excuse themselves from pleading it; and to prevent others, the Attorney for the Plaintiff usually delivers Declarations with an Imparlance to the first Court after the Arrest; and then they pretend that such Plea comes too late after an Imparlance; but Prohibitions have been granted when a Plea to the Jurisdiction is tendered at the same Court in which the Declaration is put in, and the Plea refused, notwithstanding such Imparlance.

The Books are plain, that an Action will not lie against another for suing in a Course of Justice, tho' not in a proper Course; as if a Man bring an Appeal of Murder, returnable in the Common Pleas; this is ineffectual, because that Court hath no Jurisdiction of the Matter; but an Action will not lie against the Appellant; and this was agreed in Sir Richard Buckley's Case.

4 Rep. * Cooper *versus* Cooper.

* In Hill. 18, 19 Car. II. this Case happened, ff. A Man was arrested by Process out of an inferiour Court, and the Person arrested brought an Action against the Plaintiff for suing without a Cause, and pretending great Damages, and imprisoning him for Want of Bail; ubi revera he had no Cause of Action infra Jurisdictionem: It has been objected that my Lord Hale, who was then Chief Baron, held, this Action would lie for suing in an inferiour Court, when the Cause did arise extra Jurisdictionem, &c. but that was not the Reason, for the Gist of the Action was procuring the Plaintiff to be arrested, and to be held to Bail upon pretended Damages, for which an Action will lie, tho' the Court had a Jurisdiction of the Cause; and therefore it was impertinent to add, that revera he had no Cause of Action infra Jurisdictionem; so that this doth not concern the principal Case.

Lastly, as a further Excuse to all the Defendants, here is an Action entered, Process awarded and returned, which seems to be a very good Justification for the Assault alledged without an Averment, that the Cause of Action did arise infra Jurisdictionem; and for these Reasons Judgment was given for the Defendants, that this Action did not lie against either of them.

All that I shall observe in this Case is, that the Serjeant had it from the Report of Mr. *Dodd*; I wish his Argument had been transcribed as carefully as that of Sir *Thomas Powys* in the first Volume, or of that learned Judge in this; because such Arguments may rectify and not puzzle our Understandings, and are infinitely to be preferred before those mysterious Scraps of Law which are catch'd at the Bar, and huddled together in large Volumes, without any Order or Method.

Ackley versus *Newnham* & al'.

Trin. 6 W. & M. C. B.

IN an Action of Trespass for an Assault, Battery, and false Imprisonment; the Defendant as to the Force pleads Not guilty, and as to the rest, he justified by Process out of an inferiour Court, and that the now Plaintiff being in Custody, made his Escape to a Place out of his Jurisdiction, &c. and that the Defendants did retake him upon a fresh Pursuit, &c. And there is nothing more in this Case.

Baldwyn versus *Hayley* & al'.

THIS was a Plea in Bar to the like Action laid in Shropshire, wherein the Defendant justified by Vertue of a Judgment and a Ca. sa. against the Plaintiff, upon which he was arrested at Farlow in Herefordshire; and refusing to go to Gaol, the Defendants were compelled to use Force; and that they could not bring him to Hereford Gaol but thro' Clobury in Shropshire, which was the direct Way thither; that he was brought to Clobury, and there he discoursed with the Plaintiff, and gave Security to pay the Debt, and so was discharged; and avers that 'tis the same Arrest, &c. and traversed that they were guilty at any Time before the Delivery of the Warrant, or after the Plaintiff was discharged; and likewise traversed that they were guilty of the Beating at Clobury, or elsewhere, out of Herefordshire.

The Serjeant hath put a *Quære* concerning these Traverses, by Reason of the Averment *quæ sunt eadem, &c.* Now this being a little dark and mysterious, may be thus english'd: *ff.* There is no Occasion of a Traverse where the Defendant avers, That the Trespass which he hath justified in his Plea *is the same*, of which the Plaintiff complained in his Declaration.

But as to this Matter, the Law seems to be, *viz.* That where a Trespass is laid in a *particular Place*, and the Defendant justifies in another Place, if the Matter of Justification is local, he ought to shew the special Cause, and *traverse* the Place in the Declaration: As for instance, If a Trespass, *&c.* is laid in *London*, the Defendant may plead that the Plaintiff entered his House at *Waltham*, and justify in Defence of his Possession, *quæ est eadem Transgressio*; but notwithstanding that Averment, he must traverse that he is guilty *extra Waltham*; for the very Cause of his Justification is local, and confined to that particular Place; for which Reason he must traverse all other Places.

Cro. Eliz. 667, 705.

But

But 'tis otherwise where the Cause of Justification is either transitory or personal; *ff.* As if the Plaintiff brings an Action of Trespass for taking his Cattle at *Stockbridge*, the Defendant justified the taking Damage-feasant, *&c.* at *Motford*, and *driving* them to *Stockbridge*, and from thence to *Feversham*, and averred, that 'tis *eadem captio*; there the Averment made the Plea good without a Traverse, because this Justification is transitory, and may be alledged in any Place; and a Traverse that he took the Cattle at *Stockbridge* had certainly been naught, because it had been a Departure from what was before alledged in the Plea, *viz.* That he did drive them to *Stockbridge*.

The Cases before-mentioned relate only where the Defendants justified in different Places from those laid in the Declaration; but these following are where it differs in Point of Time; as if a Trespass is alledged to be done 21 *Maii*, and the Defendant justifies on the 22d Day, and avers, that 'tis *eadem Transgressio*; this is good without a Traverse of the Time laid in the Declaration. 2 *Jones* 146. 1 *Vent.* 184. contra.

In 3 *Lev.* 227. In an Action of Trespass, *&c.* the Justification differed both from the Time and Place laid in the Declaration; but there was an Averment that it was *eadem Transgressio*: 'Tis true, there was a Traverse of the Place, but not of the Time; and the Court held the Plea good.

Now if the Plea is good by such an Averment, then the Addition of a Traverse is no more than Surplusage; but if the Plaintiff had *demurred to it, and shewed it specially for Cause, it had made the Plea ill. * Postea *Hargrave* versus *Ward*.

Rowell versus *Dyon* & al'.

Hill. 9 W. III.

Lincoln, ff. AN Action of Assault was brought against the Defendants, for that they, together with one John Breackenbury, did assault the Plaintiff, &c. on the 15th Day of May, and detained him in Prison twenty Days.

The Defendants plead in Bar, That the said Assault, &c. was committed by them, conjunctim with the said Breackenbury; for which Assault the Plaintiff brought an Action against Breackenbury alone, and had a Verdict and Damages; and to prevent his being taken in Execution, he paid the Damages to the Plaintiff's Attorney, by the Order and Consent of the Plaintiff himself.

The Plaintiff replied Nul tiel Record.

The Defendants rejoined, that there was such a Record, and prayed that it might be inspected, and thereupon it was brought into Court; and there was a Variance alledged between the Record it self, set forth in the Plea, and the Record in this very Action; for

the Plaintiff in this Action had declared for an Assault done on the 15th of May 9 W. III. and imprisoning him twenty Days; and the Record against Breackenbury was for an Assault committed 14 Maii, and imprisoning the Plaintiff for ten Days.

Now because the Defendant had not averred in his Plea, that this was eadem Transgressio, it was held to be a material Variance.

Davis versus *Yale* & al'.

Cooke. Hill. 11 W. III Rot. 1718. C. B.

London, ss. TRESPASS for an Assault, &c. at Fort St. George in the Indies, viz. At London, in the Parish of St. Mary le-Bow, &c. and for detaining him in Prison, &c. and for taking 3000 Pagadoes, being Pieces of foreign Money.

The Defendant, as to all besides the taking the Money, pleads the Statute of Limitations: ss. That the Cause of Action as to that did not arise within four Years next before the Action brought; and as to the taking the Money, that the Cause, &c. did not accrew within six Years, &c.

The Plaintiff replies as to the Trespass, &c. that the Defendant was beyond Sea, and that as to the taking the Money, that the Cause of Action did arise infra sex Annos; and upon Demurrer it was held that this Declaration was ill; 1. Because the Trespass is supposed to be at Fort St. George beyond Sea, viz. apud London, which is contradictory and absurd; for if a Bond bears Date at Paris, it cannot be tried here.

3 Mod. 311. 2. The Statute of Limitations cannot in Equity be extended to Cases where the Defendants are beyond Sea, for 'tis expressly said, That if the Plaintiff is beyond Sea when the Cause of Action doth accrew, he shall have Liberty at his Return to bring the Action, &c. but if he is here, and the Defendant beyond Sea, then he must file an Original against him, and continue it till the Defendant return.

The whole Court was of this Opinion, but gave the Plaintiff Leave to discontinue.

False Judgment.

Buszard versus *Bull.*

Cooke. Mich. 3 Jac. II. Rot. 796.

Leicester, ff. TRESPASS in an inferior Court for inartificially spaying a Sow; upon Demurrer to the Declaration there was Judgment for the Plaintiff, and a Writ of Enquiry of Damages; and now these Objections were made,

1st Obj. That it doth not appear that the Earl of Huntingdon had Power to make a Deputy.

Now as to this Matter, it is to be observed, that in the Style of this inferiour Court, it was said to be held before *Lawrence Carter*, *Deputy Steward* to the Earl of *Huntingdon*, Steward of our Lord the King of his Honour of *Leicester*, Parcel of the Dutchy of *Lancaster*; and it doth not appear that the Earl had Power to make a Deputy, for he was a Steward himself; which is an Office of Knowledge and Discretion.

But it was held that he had Power, *&c.* because, in respect of the Smallness of the Office, and the Dignity of the Person of the Earl, who is always supposed to attend the Service of the King and the Publick, the Law implieth, that his Stewardship of a base Court shall be exercised by Deputy; and so is the Earl of *Shrewsbury*'s Case. * 9 *Rep.* 48. *B.* 49.

2d Obj. That the first Process was a Capias; 'tis true, there ought to go a Summons first; but this is aided by the Defendant's Appearance.

3d Obj. That the Declaration was before the Defendant appeared; but this was likewise disallowed, because it was all at the same Court.

4th Obj. That upon the Demurrer, Day was given till the next Court, without mentioning any certain Day; and this was held an incurable Fault; but it appearing upon the Pleading that this was a Court of Record, a Writ of Errors lies, and not a Writ of False Judgment, as this was; but the Judgment being not compleat, but only a Writ of Enquiry; nothing more was done.

Wilson versus *Leathat.*

Hill. 3 Jac. II. Rot. 1797.

Cumber- land, ff. TRESPASS in an inferiour Court brought by an Infant, but she did not declare per proximum Amicum.

Upon Not guilty pleaded, a Venire facias was awarded, in which the Word Scire was wrote, instead of Sciri; and at the Return thereof the Jury appeared, and twelve of them, qui ad veritatem, &c. per Curiam elect', triat' & jurat' existen', &c. gave a Verdict for the Plaintiff; and upon a Recordari facias loquelam these Errors were assigned.

1. Scire for Sciri.

2. That the Plaintiff had not declared per proximum Amicum.

3. That the Jury Triat' fuerunt by the Court, which cannot be, for they are to be tried by Triors; and for these Reasons the Judgment was reversed.

Butterfield versus *Sarton.*

Cooke. Hill. 13 W. III. Rot. 588. C. B.

York, ff. INDEBITATUS assumpsit, and Quantum meruit for Goods sold; this Action was brought in an inferiour Court, and Judgment was given against the Defendant, who brought a Writ of False Judgment, and assigned Errors.

ff. 1. That 'tis not mentioned in the Plaint what Damages the Plaintiff had sustained.

After this and several other Errors assigned, the Plaintiff in the original Action pleaded that the Judgment was not falsly given, neither ought the Court to proceed to examine Errors, because it appeared in the Plaint what Damages the Plaintiff had sustained; and so answers all the other Errors assigned; and that there was a Variance between the Plaint returned, and that upon which the Judgment was given; and traverses that any of the Errors assigned were contained in that Plaint, & hoc parat' est verificare, unde petit Judicium.

This Plea is grounded upon the Statute 1 *Ed.* 3. *cap.* 4. by which 'tis enacted, That when a Record is removed into *B. R.* by a Writ of False Judgment, and the Party alledgeth a Variance between the Record removed, and that on which the Judgment is given, the Averment shall be by those who were present in Court when the Record was made up, *Herne* 399.

The

The Meaning of it is thus. *ſſ.* The *Recordare* to remove a Plaint where False Judgment is given in a *County-Court*, is directed to the Sheriff, by which he is commanded to have the Record before the Judges at *Weſtminſter*, on a certain Day, *ſub ſigillo ſuo & ſigillis quatuor legalium militum ejuſdem Comitatus ex illis qui recordo illo interfuerint*, by which it appears, that the Record of the Proceedings is to be made and tranſmitted to the Courts above, by the Sheriff and others.

Now the Statute aforeſaid enacts, That when the Record is thus removed, and a Variance is alledged between it and that on which the Judgment was given, the *Averment* ſhall be by thoſe who were preſent in Court when the Record was made up, that is, it ſhall be tried by thoſe who were then prefent; for the Word *Averment* in this Place, ſignifies an Act or Trial, and not an Offer to juſtify the Thing.

Formedon.

Formedon.

White versus *Austin.*

Belvin. Pas. 2 Jac. II. Rot. 614.

Cambridge, ss. FORMEDON in Descender, for one Messuage and fifteen Acres of Land in the Isle of Ely; setting forth, That Margaret Warden, being seized of the Premisses in Fee, devised the same to Thomas White and the Heirs of his Body, who entered and died; and thereupon the Lands descended to Thomas White his Son, and after his Death, to John White, the now Demandant.

The Tenant pleaded in Bar, That in the said Isle of Ely, Time out of Mind, amongst other Royal Franchises belonging to the Bishop, there is a Court of Record there held, in which Fines have been levied of Lands in that Island, to bar Entails, &c. and that Thomas White, the Father of the now Demandant, levied a Fine of the Premisses, to the Father of the now Tenant and his Heirs, by the Name of one Messuage, one Garden, one Orchard and Common of Pasture in the *Isle of Ely.*

The Plaintiff replied, That it doth not appear that the fifteen Acres were contained in the said Fine; and so prayed Seisin of the Messuage and Lands.

The Defendant rejoined, and prayed Judgment for the House, because the Plaintiff had not answered as to that, and as to the fifteen Acres he said, That those Lands as well as the House, are contained in the Fine, by the Names of one Messuage, one Garden, one Orchard and Common of Pasture; and upon Demurrer Judgment was given for the Demandant; for admitting the Fine to be good, which will be difficult to maintain, 'tis but a Discontinuance of the Estate Tail; the Effect of which is, That though these fifteen Acres are the Lands of the Demandant, to which he hath a Right, yet he cannot enter, but must bring his *Formedon*, and recover Possession by Law.

Wright.

Wright verſus *Byard* & Ux'.

Trin. 1 Annæ.

Lincoln, ſſ. FORMEDON in Remainder brought by John Wright, for one Meſſuage, twenty Acres of Land, and five Acres of Meadow, &c. ſetting forth, That Chriſtopher Wright was ſeized of the Premiſſes in Fee, and ſettled the ſame upon Truſtees and their Heirs; to the Uſe of himſelf for Life, and after his Deceaſe, to the Uſe of his Son Chriſtopher Wright, and the Heirs of his Body, and for Default of ſuch Iſſue, to the Uſe of John Wright, his Heirs and Aſſigns for ever.

That Chriſtopher, the Father and Son, are both dead, and that the Demandant is Son and Heir of Chriſtopher the Son, to whom jus remanſit, &c.

The Tenant pleads the Statute of Limitations, viz. That Chriſtopher the Son did not proſecute his Writ within twenty Years after the Cauſe of Action did accrue, & hoc parat. eſt verificare, &c. And there was nothing farther done in it.

Hunloke verſus *Petre*.

Hill. 3 W. & M. Rot. 91.

Derby, ſſ. FORMEDON in Reverter, for the Manor of Weſthallam, and twenty Meſſuages, ſetting forth, That a Recovery was ſuffered of the Premiſſes by Henry Powtrell and Anne his Wife, to the Uſe of the ſaid Henry for Life, Remainder to the Wife for Life, Remainder to his firſt Son in Tail male, Remainder to Robert Powtrell, younger Brother of the ſaid Henry for Life; Remainder to his firſt Son in Tail male, Remainder to the heirs of the Body of the ſaid Henry; Remainder to his own right heirs for ever.

That Henry Powtrell granted this Reverſion to John and others, and their Heirs, to the Uſe of the Demandant Hunlock and his heirs; which after the Death of Henry and Anne, and of Robert, John and William Powtrell, Sons of the ſaid Robert, reverti debet to the Demandant, for that they were all dead without Iſſue male.

This was the Writ, and the Count was, That Henry Powtrell being ſeized of the ſaid Manor and Premiſſes in Fee, he and his Wife levied a Fine thereof per nomina of the Manor of Weſthallam, and * ſixteen Meſſuages, &c. to Anthony Stanford and Gilbert Clerke, and their Heirs, to make them Tenants to the Præcipe; then he ſets forth the Recovery as aforeſaid, to the Uſes as aforeſaid;

* The Writ was 20.

ſaid; and the Grant of the Reverſion to the Demandant, and that after the Death of Henry remanſit jus to John the Son of Robert, and from him to William, another of the Sons of Robert, who being dead without Iſſue, revertit jus to the Demandant.

After ſeveral Imparlances the Tenant pleads Non-tenure in Abatement.

The Demandant replies, That he was Tenant at the Time of the Writ brought, and tenders an Iſſue.

There was a Demurrer to the Replication, and a Joinder in Demurrer, and after ſome Continuances, Judgment was given, That the Tenant ſhould anſwer over.

Then he demurred to the Declaration, for that the Demandant had not alledged that any of the Donors had taken the Profits of the Lands, the uſual Words capiendo inde exples ad valenciam; which Word *Exples*, ſignifies the *full* Profits of the Land, from the *Latin* Word *expleo*.

3 *Lev.* 330. The Serjeant tells us, that his Brother *Levinz* hath reported this very Caſe, ſo far as the Plea of Non-tenure in Abatement, which was thus. *ſſ.* The Tenant having pleaded Non-tenure, the Demandant ought not to have maintained his Writ, becauſe there being no Damages, but only the Poſſeſſion to be recovered; but Serjeant *Levinz* tells us, the Court was of another Opinion, *viz.* That by this Replication the Demandant might maintain his Writ; for ſuppoſe the Tenant had not the *immediate* Freehold, but was intitled to the *Reverſion* in Fee, and in ſuch Caſe had pleaded *Non-tenure*, the Demandant ſhould not have been remitted to the Fee; for by the ſingle Plea of Non-tenure, nothing is diſowned but the *immediate* Freehold; but if the Defendant had pleaded Non-tenure and Diſclaimer. *ſſ. Quod non eſt tenens nec aliquid habuit, &c. nec aliquid habere clamavit vel clamat ſed penitus deadvocat & diſclamat*, there the Demandant ſhall be remitted to the whole, becauſe the whole is diſclaimed; and ſo muſt * *Littleton* be underſtood. *ſſ.* Where there is a Non-tenure pleaded with a Diſclaimer; for ſo were the Pleadings generally in his Time; thus far that Serjeant.

* *Sect.* 691.

But now our Serjeant farther tells us, That he was of Counſel for the Tenant; and that the Cauſe was agreed before he argued it; but becauſe we ſhould not loſe what he intended to ſay in this Caſe, he maintains that there is a good Cauſe of Demurrer.

ſſ. 1. Becauſe 'tis not ſaid, that the Donor had taken the full Profits of the Land.

8 Ed. 3. 19 plac. 3. 9 H. 6. 53. F. N. B. 320. C. & D. The Difference is, when a Fee-ſimple is in Demand, the taking the Profits muſt be alledged both in the Donor and Donee; but where an Eſtate Tail is only demanded, then it muſt be alledged in the Donee alone; the Books in the Margent are expreſs, that in a Formedon in Reverter, the Explees ought to be alledged both in Donor and Donee. There is another Year-Book cited, *viz.* 27 *Ed.* 3. 84. but that muſt be a Miſtake, for there are not ſo many *Folio's* or *Placita's* in that Year.

Then

Then *Fitzh.* Tit. *Formedon* 31. is cited, *viz.* That as to a Remainder in Fee it was ruled, That the Declaration was defective for this very Fault; but this being put not very clear, I shall thus explain it. *ff.* In a *Formedon* in Remainder, the Count was, That the Land was given to one for Life, the Remainder to *B.* in Tail, Remainder to the Demandant in Fee; and lays the *Explees* in the Tenant for Life, which was held ill; for where a Fee is in Demand, they must be laid in the Donor.

But in a Formedon in Descender, where the Demandant sets forth, That the Lands were in Lease to A. for Life, and the Reversion was granted to his Father in Tail, there the Explees must be alledged in the Termor for Life, and in the Donee in Tail; because a Fee-Tail was demanded: Yet 'tis otherwise in a Formedon in Reverter, because there a Fee-simple is always in Demand, and in such Case the Explees must be alledged both in Donor and Donee; and so are the Precedents in Rastal 375. plac. 3. Co. Ent. 341. Aston 405, 406.

Now if it should be objected that there is no Donor in this Case, the Answer is, That it appears upon the Pleadings, that Henry Powtrel was seized in Fee, and that he levied a Fine to make a Tenant to the Præcipe, in order to suffer a Common Recovery, which was done; and both the Fine and Recovery made but one Assurance, and so the Estate moved from him, and therefore he was the Donor, and so the Explees ought to be alledged in him.

Besides, 'tis absurd that there should be a Donee in Tail without a Donor; and if there was no such Donee, then there could be no Formedon in Reverter.

2. There was another Objection, That the Declaration had falsified the Writ; because in the Writ, there is a Demand of twenty Messuages, and in the Declaration 'tis alledged, That a Fine was levied of the said Tenements, by the Names of sixteen Messuages, which is impossible, because twenty cannot pass by the Name of sixteen.

'Tis like an Ejectment upon a Demise of a house, and ten Acres of Land, twenty of Meadow, and twenty of Pasture, by the Name of ten Acres of Meadow more or less; here the Words more or less must have a reasonable Construction, to pass a Quantity of Lands near the Number ten, and not so much as twenty. Owen 133. Yelv. 166. 1 Brownl. 145. *id. m.*

Now admitting twenty Messuages should be intended, there being but sixteen in the Fine, then 'tis plain there could be no Tenant to the Præcipe, as to four of them; and if so, then the Demandant can never recover according to the Writ; and therefore upon his own Shewing it must abate.

Vaughan

Vaughan verſus *Rowlands* & Ux'.

Montgomery, ſſ. IN a Formedon in Deſcender, the Demandant ſets forth, That Humfry Owen being ſeized in Fee, made a Feoffment of one Moiety of the Lands to the Uſe of himſelf for Life, Remainder to the Uſe of Eluſtan Vaughan, and Ellen his Wife, for their joint Lives; and after their Deceaſe, to the Uſe of the Heirs of the Body of the Husband, begotten on the Body of the Wife.

And as to the other Moiety, to the Husband and Wife for their joint Lives, with the like Limitation in Remainder as before; by Vertue whereof the ſaid Humfry had an Eſtate for Life in the firſt mentioned Moiety, Remainder to the Husband and Wife for their joint Lives, and after the Deceaſe of one of them, Remainder to the Heirs of the Body of the Husband, on the Body of the Wife to be begotten.

And as to the other Moiety, the Husband had an Eſtate in Fee-Tail, and the Wife for Life.

That Humfry died, and the Husband and Wife entered into the Moiety firſt mentioned, and were ſeized thereof; that is to ſay, the Husband in Fee-Tail, and the Wife of a Freehold during their joint Lives.

That the Husband died, and then the Wife became ſole ſeized of one Moiety for Life, Remainder to Humfry her Son; that the Wife died, and then the whole ſurvived to the Son, and from him jus deſcendit to the Demandant, as Couſin and Heir of Eluſtan, (that is to ſay) Son and Heir of Hugh, who was Son and Heir of Humfry, who was Son and Heir of Eluſtan, on the Body of Ellen begotten.

This Caſe is without Term, Court or Number-Roll, or any farther Proceeding in it; and mentioned by the Serjeant, that he might correct a Miſtake in * *Fitzherbert*; who in the Reign of *H.* 8. was asked this Queſtion by a Clerk. *ſſ.* If Lands are given to Huſband and Wife, and to the Heirs of the Body of the Wife, and they ſhould bring a *Formedon*, in what Manner muſt the Seiſin be alledged in them?

* 27 *H.* 8. 21. *pl.* 13.

Fitzherbert, who was then a Judge of the Common Pleas, made this Anſwer, That in pleading this Eſtate it muſt be thus: *ſſ.* By Vertue whereof, the Husband and Wife were ſeized *together*, and to the Heirs of the Body of the Wife, in the Right of the Wife; and muſt not ſay (as in the Caſe at Bar) that they or either of them were ſeized of a Freehold, or of a Fee-Tail.

Br. Abr. Tit, *Pleading*, 3.

Now this was only a ſudden Opinion of the Judge; it was queſtioned by my Lord *Brook*, in abridging the Caſe, who cites *Littleton*, *fo.* 26. where 'tis ſaid, That if Lands are given to a Man and his Wife, and to the Heirs of the Body of the Husband, that he hath an Eſtate Tail, and the Wife an Eſtate for Life; but if 'tis to the

Heirs of the Body of the Husband, begotten on the Body of the Wife, that in ſuch Caſe the Husband hath an Eſtate in ſpecial Tail; and this my Lord *Coke* tells us is ſo plain that it needs no Explanation.

All that I ſhall obſerve under this Title is, That the Serjeant hath given us a Taſte of the three Sorts of Formedons in Deſcender, Remainder, and Reverter; the firſt is for Recovery of Lands entailed upon a Man and the Heirs of his Body, and afterwards alienated by him, and is always brought by the Iſſue, who claim by Deſcent *per formam Doni*; the other is where Lands are entailed upon a Man, Remainder to another in Tail, and the firſt Tenant in Tail dieth without Iſſue, and this is brought by him in Remainder, after the Determination of a former Eſtate-Tail; the laſt is where a Reverſion after an Eſtate-Tail is limited to the Donor and his Heirs; there, after the Eſtate-Tail is ſpent, the Reverſioner or his Heirs or Aſſigns, may be entitled to this Remedy.

But ſince Common Recoveries are ſo much in Faſhion, 'tis very rare that any of theſe Formedons are brought; the Serjeant indeed mentions three lately brought, *viz.* One in the Reign of King *James*, another in the Reign of King *William*, the third in the preſent Reign, and another the Lord knows when; but the Practice now is, That where an Entail is but in the leaſt Manner ſuſpected to ſuffer a Common Recovery, which deſtroys all theſe Formedons, inſomuch that not only the Writ of Action, but the Word it ſelf is now almoſt antiquated.

I remember that once I heard two Attorneys boaſting of their Knowledge in their Profeſſion, and at the ſame Time undervaluing each other's Abilities; and after a very hot and ſenſeleſs Diſpute, one of them told the other that he had brought a *Formedon* in the Law, and recovered the Land for his Client; this was a very deciſive Stroke, for the other Attorney ſtood amazed at the Sound of the Word: And now the Champion with his *Formedon* inſulting his Adverſary in a very rude Manner, a young Lawyer to ſilence them both, told him, That tho' he had been ſo fortunate as to recover for his Client in the *Formedon*, yet there were ſome other Suits now commenced both againſt his Client and himſelf; for the Parſon of the Pariſh had brought a *Juris utrum* againſt his Client, and a *Non moleſtando*, and alſo a *Ne injuſte vexes* againſt himſelf; and this put an End to the Diſpute.

Foreign Attachment.

North versus *Winskell.*

Sturmy. Hil. 3 & 4 Jac. II. Rot. 379.

Midd. ff. DEBT on Bond bought by Elizabeth North against John Winskell.

The Defendant Winskell pleads in Bar, setting forth the Custom of London; That if a Plaint is levied in the Sheriff's Court against an Administrator, and the Defendant doth not appear upon a Summons of a Serjeant at Mace, then if the said Serjeant shall testify Ore tenus, that the Defendant nihil habuit within the City, by which he may be summoned, and if the Plaintiff will alledge Ore tenus, that either he, or any other Person, is indebted to the Defendant, as Executor or Administrator, &c. that then the Defendant, in such Plaint, may be attached by the said Debt to appear and answer, &c. at the next Court; and if the Serjeant shall then testify that the Defendant was attached, &c. by the Money either in the Plaintiff's Hands, or in the Hands of any other Debtor; and if the said Defendant did not then appear, nor in three Courts following after the said Attachment, then if the Plaintiff either by himself, or by his Attorney, will swear that the Debt for which he sues is a just and true Debt due to him, and detained by the Defendant, that in such Case the Plaintiff shall have Execution of the Debt so owing by him to the Defendant, finding Pledges to restore it, if the Debt shall be disproved by the Defendant, within a Year next ensuing; and after Execution and Pledges found as aforesaid, the Plaintiff shall be discharged of the said Debt against the Defendant, and likewise the Defendant shall be discharged thereof, so long as the Judgment remains in Force, and that the Customs of London are confirmed by Act of Parliament.

Then the Defendant Winskell further sets forth, That John North was indebted to him in 55 l. and died, and that Administration was committed to Elizabeth North his Wife, and now Plaintiff.

Then

That afterwards he levied a Plaint in the Counter against the said Administratrix for the 55 l. (but did not say it was due to him at that Time) that she was summoned by a Serjeant at Mace to appear at the next Court, who returned that she nihil habuit, &c. and she making Default in appearing, Winskell affirmed Ore tenus that he owed the said John North * 53 l. and prayed that the Administratrix might be attached by that Money in his Hands, which was done accordingly; and she not appearing in four Courts afterwards, Winskell at the 5th Court prayed Execution for the said 53 l. so attached in his Hands, and made Oath that John North owed him that Money, and that the Administratrix detained it from him; and thereupon he had Judgment to recover the said 53 l. in Part of the 55 l. due to him from John North, and found Pledges, &c. then he avers that the 15 l. for which he was now sued, is Parcel of the 53 l. and that the Persons are the same, and that the Bond on which the Plaintiff now declared was made to her for Part of the 55 l. which the said Winskell owed John North, and for securing of 15 l. due to the said Elizabeth, as Executrix of John North, &c.

* But did not say *Infra jurisdictionem Curiæ.*

Upon a Demurrer to this Plea, these Exceptions were taken to it.

1. It doth not appear that there was any Debt due to Winskell before the Attachment made, for he cannot levy a Plaint for an Original Debt before 'tis due, and by Consequence cannot have a Foreign Attachment to compel an Appearance to such Plaint. Cro. Eliz. 184. 1 Rol. Abr. 553 *idem.*

2. 'Tis not alledged that the Parties were within the Jurisdiction of the Court at the Time of the Attachment brought; and these were held to be material Exceptions; but yet the Plaintiff had Judgment, because the Custom alledged in the Plea is very unreasonable, viz. for the Plaintiff in an inferiour Court to swear either by himself, or his Attorney, that 'tis a true Debt owing to him. 1 Rol. Abr. 554 *pl.* 3 & 4.

Besides the Custom doth not extend to the Debt, for which the Action is now brought; for it plainly appears to be upon a Bond entered into by *Winskell* to *Elizabeth North*, after the Death of *John North*, and therefore it cannot be attachable in his Hands, as a Debt due to *John North tempore mortis*; 'tis like the Case where an *Executor* and another submitted to an Award, and the Arbitrators awarded the Defendant to pay 350 *l.* this Money is not attachable in his Hands by any Creditor of the *Testator*, tho' 'tis Assets in the Hands of the Executor, when 'tis recovered; and the Reason why 'tis not attachable is, because it was not due to the Testator *tempore mortis*; and the Custom only extends to such Debts. 1 *Vent.* 111. 1 *Lev.* 306.

Then as to the Averment, That the Bond was given to the Administratrix for Parcel of the Debt of 55 *l.* this must be very absurd, because the 55 l. was due from John North to Winskell, and so he must give a Bond for Part of a Debt due to himself; and then to say that it was to secure Part of the 53 *l.* due from him to the said North, is contradictory to what he alledged before.

Scarpe versus *Young*.

Tempest. Pas. 4 W. & M. Rot. 266.

Suffolk, ss. DEBT upon Bond of 100l. brought by Henry Scarpe, against Young.

The Defendant pleads in Bar, and sets forth the Custom of London, viz. That if an original Bill of Debt is brought in the Lord Mayor's Court, the Serjeant at Mace may summon the Defendant to appear; and if he return nihil habuit, and the Defendant makes Default, &c. then if the Plaintiff in the said Court signifieth that he oweth any Money to the Defendant, he shall be attached by that Debt to appear, &c. and if the Money so attached doth not amount to the Value of the Debt, then Process shall issue against the Defendant.

That the now Plaintiff Henry Scarpe was indebted to Anthony Scarpe in 200l. upon Bond; that Anthony died at St. Edmond's Bury, &c. and that Administration of his Goods was granted by the Archdeacon of Sudbury to Bartholomew Young, who brought an Action in the Mayor's Court against Henry Scarpe; that a Serjeant at Mace was commanded to summon him to appear, who returned nihil habuit; and thereupon the said Bartholomew informed the Court that he owed the said Henry Scarpe 110l. and prayed that he might be attached by that Money in his Hands to appear at the next Court, which was done accordingly; and he not appearing in four Court Days, the said Bartholomew at the next Court had Judgment and Execution for the said Debt of 110l. and Process against him for the Remainder of the 200l. and found Pledges to return the Money, if the Debt should be disproved by the said Henry Scarpe within a Year and a Day; and thereupon the said Bartholomew acknowledged himself to be satisfied de præd' Centum & decem Libris, &c. which Judgment is still in force, &c.

Henry Scarpe, the now Plaintiff, replied, That Anthony Scarpe the Intestate had bona notabilia, so that Administration of his Goods ought to be committed by the Metropolitan; and upon Demurrer to this Replication,

First, it was insisted for the Plaintiff, that the Matter of this Replication was well pleaded, tho' the precise Certainty where the Intestate had bona notabilia was not set forth according to Sir * John Needham's Case, for there the Action was brought by Husband and Wife Administratrix, setting forth, That Administration was granted to her by the Bishop of *Rochester*.

* 8 Rep. 135.

The Defendant pleads, That Administration was committed to her by the Dean and Chapter of *Canterbury sede vacante*, for that the Intestate at the Time of her Death had *bona notabilia in diversis Diocesibus Provinciæ Cantuar.*

Now

Now in the first Resolution of that Case it was held, That because the Defendant had not set forth any Certainty where the Intestate had *bona notabilia*, but only *in diversis Diocesibus Provinciæ Cantuar'*; and therefore it shall be taken that Administration was granted where the Intestate had not *bona notabilia*; and by a Marginal Note to that Case of Justice *Croke*'s Hand-writing, he gives this Reason for it, *viz.* because every Plea shall be taken in the strictest Sense against the Pleader.

The Precedents cited in my Lord *Coke*'s and *Rastall*'s Entries are, *ss.* That Administration was granted by the Archbishop, because the Intestate had *diversa bona* in * *diversis Diocesibus*, without shewing any further Certainty, which is not altogether so certain as the Precedent in the principal Case; for there 'tis said that the Intestate had *bona notabilia in diversis Diocesibus*, within the Province of *Canterbury*, *viz.* at *Westminster* in the County of *Middlesex*, and Dioceſs of *London*, *&c.* and at *St. Edmond's Bury* within the Dioceſs of *Norwich*, *&c.*

Co. Ent. 128. *Rast. Tit* Bar in Executors, 16.

* *Rol. Tit.* Executor 324.

The Precedent in *Rastall*, Tit. *Executors*, 1. is mistaken; for there the Administration was granted by a Commissary, *&c. cui pertinuit*, *&c. eo quod* the intestate *nonnulla habuit bona notabilia* at *B.* within such an Archdeaconry.

2. **That the said Matter alledged in this Replication, tho' it was only a Relation of Fact, yet it was sufficient to set aside a Judgment upon a Foreign Attachment, without bringing a Writ of Error.**

To prove this the Year-Book 27 *Ed.* 4. was cited; but the Year is mistaken, it should be 22 *Ed.* 4. where the Case is, *ss.* In Debt, the Defendant pleaded the Custom of *London*, *&c.* and a Judgment upon a Foreign Attachment, *&c.* The Plaintiff replied that there was no such Custom, whereupon the Recorder of *London* certified the Custom *Ore tenus*; and moreover, that after Judgment and *Execution* for the Money attached, the Defendant shall be discharged from his first Debtor, *&c.*

22 *Ed.* 4. *pl.* 30.

The Plaintiff demanded Judgment, because the Custom certified by the Recorder varied from that Custom set forth in the Plea, for that was, That a *Judgment* upon a Foreign Attachment shall bind; but the Custom certified was, That a *Judgment and Execution* for the Money attached shall be a Discharge, which implies, that the Judgment alone is not binding.

But then a Question did arise, *ss.* Whether a Plea, denying the Custom, should be allowed to be pleaded after there was a Judgment had and obtained upon the Custom it self? Or whether the Party should not bring a Writ of Error to avoid that Judgment?

Two of the Judges, *viz.* *Choke* and *Husſey*, thus distinguished: Where a Judgment is given for any Matter at Common Law, if 'tis erroneous, it must be reversed by Writ of Error, and not set aside by a Plea; but where a Judgment is given upon a Custom, it may be avoided by a Plea denying the Custom; as that Case was.

'Tis true, there were two other Judges, *viz.* *Catesby* and *Townsend*, of a contrary Opinion; but my Lord *Brook* in abridging that Case tells us, that the first is the better Opinion.

Bro Tit. Bar. 490. *and not* 92.

* *Cro. Eliz.* 598. 1 *Rol. Abr.* 551. idem.

In * *Cro. Eliz.* the Case was, *ff.* A Foreign Attachment was pleaded to an Action of Debt, *&c.*

The Plaintiff replied, That he was not indebted to the Defendant in any Sum by which he might be attached, *&c.* And this was held a good Replication, because 'tis a Matter issuable whether he was indebted or not; for if he was not indebted, then he could not be attached.

But admitting the Replication to be ill, the Plea in Bar is so likewise, because the Custom is not strictly pursued.

1. ff. 'Tis alledged to be that the Plaintiff shall have Execution of the Debt attached, he finding Pledges to restore it, if the Defendant disprove the Debt within a Year and a Day.

Latch. 208. Now the Defendant hath not pursued this Part of the Custom, for he hath not set forth any such Conditional Judgment given by the Court; and so is 1 Brownl. 60. Dyer 146.

He that reads this Precedent, (as 'tis called) and this Objection, must necessarily think that the Serjeant, (tho' he was of Counsel for the Plaintiff) never read this Plea; for if the Judgment in this Case is not conditional, I know not what is.

ff. *Ideo adjudicatum fuit* by the Court, that the Plaintiff should have Execution for the 110*l. &c. duos Plegios* (*adjunct*') for *adtunc in eadem Curia invenire* to secure the Money, *if* the Debt be disproved by the Defendant within a Year and a Day.

* *Dyer* 247. *Toft*'s Case in * *Dyer* is nothing to this Purpose: ff. *Toft* owed *Foxcroft* 100*l. Wilkinson* owed *Toft* 12*l.* 9*s.*

Toft died intestate, and the Ordinary granted Administration to *Marshall.*

Afterwards *Foxcroft* sued the Ordinary for this 100*l.* in the Sheriff's Court in *London*; and upon a Summons granted, and a Retorn of *nihil habuit, &c.* the 12*l.* was attached in the Hands of *Wilkinson*, and recovered and paid to *Foxcroft.*

Then *Marshall*, the Administrator of *Toft* sued *Wilkinson* in the Common Pleas for this 12*l.* 9*s.* who pleaded the special Matter above-mentioned in Bar; and upon Demurrer, *Marshall*, the Plaintiff had Judgment, because *Foxcroft ought not to have sued the Ordinary after he had committed Administration to* Marshall; for in such Case no Action lies at Common Law, either against the Ordinary or for him, for any Debt due to the Intestate; but the Action is given by the Statute of † *W. II.* which being made within the Time of Memory, cannot make a Custom.

† *W. II. cap.* 19.

** *Cro. Eliz.* 691. The Case of ** *Humfrys* and *Barnes* is little to this Purpose: *ff.* It was an Action of Debt in the Common Pleas upon a Bill Penal for 13*l.* 13*s.* 4*d.* The Defendant pleaded a Foreign Attachment in *London* by one *Moulton* of 13*l.* in his Hands, which Attachment was made after the Retorn of the Original; but before his Appearance in the *C. P.* and before he had any Notice of a Suit there; and upon Demurrer this was held no Plea, because it did not appear that the 13*l.* attached was Part of the Debt of 13*l.* 13*s.* 4*d.* due to the Plaintiff, but the chief Reason was, because the Attachment was made pending the Action in the Common Pleas; which ought not to be done.

So

So that neither of these Cases concern any Variance between a Custom pleaded, and the Judgment given upon that Custom; and there is not one Word throughout both, tending to the principal Case, but the Word (Attachment) and therefore any Case where that Word is to be found, might have been as well cited, and as much to the Purpose as those are.

2. The Custom is alledged for the Plaintiff to have Execution of the Debt in the Original Bill mentioned; giving Pledges to restore the Money attached; and for which Execution was had, if the Debt should be disproved, &c. and he pleads, That Pledges were given to restore the Money attached, &c. when it should be the Money in the original Action contained.

I think this Objection is too nice, for the Plaintiff sets forth an original Bill of Debt for 200 l. and that the Defendant *nihil habuit* by which he could be summoned; then the Plaintiff acknowledged that he owed the Defendant 110 *l.* and prayed that he might be attached *per eadem Centum & decem libras*, which was done, and Process against him for the *Remainder* of the 200 *l. superius specificat'*, which must be in the original Bill; that he had Judgment and Execution *de præd' Centum & decem libris*, and that he put in Pledges to restore *eadem Centum & decem libras prout superius attach. fuer'* Now what 110 *l.* can this be, if 'tis not Part of the 200 *l. superius specificat'*, in the original Action? It would be a wild Imagination, to fancy it to be any other than Part of the Debt in the original Bill.

3. The Custom as alledged, must be construed to extend to an Action brought in the Right of the Plaintiff himself; but this Action is commenced in the Mayor's Court, by him as Administrator, which is in the Right of another.

4. There is a Discontinuance, for one of the Courts was held 22 Maii, and no Day was given to the Defendant to the next Court, which was held on the 23d Day of May. But no Judgment was given in this Case, for the Defendant perceiving his Bar was ill, paid the Money.

And now at the end of all, the Serjeant hath a *Nota* foreign to the Case reported; and 'tis, That the Recorder of London moved for an Imparlance to an Action on the Case, upon a Promise, until the next Term, because he was to plead a Foreign Attachment to it, but it was denied; for it may be given in Evidence upon the general Issue; and this the Court held to be the constant Practice in all Courts.

But it seems the Book tells us, That Serjeant *Henry Selby* was of Opinion, That it ought to be pleaded Specially in an Action of Debt upon a Bond; and it may be for this Reason, that the Serjeant hath made a *Nota* upon this Motion; not that his Reader might observe any Thing extraordinary in it, but that his Brother *Selby* should oppose his Opinion to the Authority of a whole Court.

Inquisition.

Inquisition.

Rex versus *Hungerford.*

Pas. 1 W. III.

York, ff. BY Vertue of an Inquisition taken upon an Indictment of Treason against Sir Roger Strickland, and an Outlawry thereon, the King seized the Lands; which were found by the said Inquisition to be infra manerium villam sive paroch' de Catterick.

Which being returned into the Exchequer, the Defendant pleads, That before the Treason committed, Sir Stafford Brathwaite was seized of the said Lands in Fee, inter alia parcell' manerii de Catterick; and being so seized, he demised the same to Jeffs for 1000 Years, who made Elizabeth his Wife Executrix, and died.

That Sir Stafford Brathwaite, by Lease and Release, conveyed the Reversion to Mary Brathwaite.

That the said Estate and Term of Years afterwards came to Barbara Strickland, who married Sir Marmaduke Dalton.

That the said Husband and Wife were possessed thereof in jure uxoris, and that they assigned the Term to my Lord Falconbridge.

That Mary Brathwaite devised the Reversion to Sir Roger Strickland, and the Heirs of his Body; and for Default of such Issue, to Robert Strickland for Life, and so to his first Son in Tail male, &c.

That the said Term of Years, by several mesne Assignments, came to one Maddison, who died; and that on the 14th of Feb. 1697, Administration of his Goods was committed to the Defendant Hungerford; and so he became intitled to the Residue of the Term, and concludes his Plea thus: ff. Unde petit judicium, and that he may enjoy the Residue of his Term as if no such Inquisition had been taken; and as if the Term in the said Inquisition had been found and specified juxta formam Statuti in hujusmodi casu edit', &c. and so prays an amoveas manus, &c.

Upon a Demurrer to this Plea, these Exceptions were taken;

1. It doth not appear that the Lands in the Inquiſition and in the Plea are the ſame, becauſe 'tis found by the Inquiſition, That Sir Roger Strickland was ſeized in Fee of Lands infra manerium villam ſive parochiam, &c. and in the Plea the Defendant derives a Title under a Leaſe of Lands Parcell' manerii de Catterick, which is narrower than the Words in the Inquiſition; and 'tis probable, that ſome of the Lands therein mentioned, might extend beyond the Manor; and therefore the Defendant ought to have pleaded, That the Leaſe was made to Jeffs de eiſdem tent' is cum pertin' parcell' manerii de Catterick per nomen of the Lands in the Leaſe, under which the Defendant Hungerford claimed, and aver, That the Lands in the Inquiſition and thoſe in the Leaſe are the ſame.

To which it was anſwered, that the Plea is, That the Defendant is Tenant of the Lands infra manerium Domini villarum ſive paroch' de Catterick, Parcel of the Premiſſes in the Inquiſition, and demands Oyer of it; and then pleads, That before the Perſon who committed the Treaſon had any Thing in thoſe Lands, Sir Stafford Brathwaite was ſeized in Fee, &c. inter alia Parcel of the ſaid Manor of Catterick, and ſo demiſed it to Jeffs in Catterick aforeſaid, Parcel of the ſaid Manor of Catterick; which is a ſufficient Averment that the Lands are in Catterick, and alſo Parcel of that Manor; and it ſhall not be intended that the Vill, Pariſh or Manor, are of greater Extent than one another.

But admitting 'tis ſo, yet the Leſſor having demiſed ten'ta præd' *in* Catterick, theſe Words extend either to the Vill, Pariſh or Manor of Catterick.

To prove this there was a Caſe cited out of *Croke Eliz.* which was thus: *ſſ.* It was an Ejectment upon a Leaſe ſuppoſed to be made *apud Denham*, of Lands in the *Pariſh* of *Denham præd'*; the *Venire facias* was *de vicineto de Denham*, and it was objected, That it ought to be *de vicineto de parochia de Denham* where the Land was; but it was held, That the Pariſh and Vill ſhall be intended the ſame; becauſe of the Words *de parochia de Denham*. *Cro. Eliz.* 538. *Hob.* 6.

Then it was objected, That Brathwaite demiſed to Jeffs the aforeſaid Tenements inter alia, which Words make the Pleading very incertain; and therefore he ſhould have alledged that the Lands were leaſed to Jeffs per nomen of ſuch Lands, naming them in particular.

But it was anſwered, That 'tis not neceſſary it ſhould be ſo pleaded: And ſo it hath been adjudged, as for Inſtance. *ſſ.* In Replevin the Defendant avowed for Rent, and pleaded, That a Fine was levied *inter alia* of the Rent; and upon Demurrer Serjeant *Davenport* objected, That it ſhould be *per nomen* of the Rent, *&c.* but my Lord Chief Juſtice *Coke* held it was well enough. 1 *Rol. Rep.* 72, 73.

The Way of Pleading *per nomen* is of no Manner of Uſe; for it never mends a Plea which is bad in the Beginning, but it often makes a Declaration ill: As for example, if a Man ſhould plead a Grant of forty Acres *per nomen* of twenty Acres *more or leſs*; theſe Words cannot poſſibly extend to ſo many as forty Acres. 1 *Rol. Rep.* 422. 1 *Brownl.* 145. *Rel.* 166. *Idem.*

But admitting this Manner of Pleading to be good, viz. That he demiſed dicta præmiſſa inter alia, yet there ought to be an expreſs Averment, That the Lands are the ſame which were demiſed, &c. 'Tis probable ſuch Pleading might not be good, where there is not a ſufficient Certainty before, to which thoſe Words dicta præmiſſa might refer; but that is not this Caſe, becauſe 'tis averred in the Plea, That the Lands therein mentioned, and thoſe in the Inquiſition are the ſame.

Beſides, 'tis the uſual Courſe to plead inter alia, where the Conveyance to be ſet forth, contains more in it than what relates to the ſubject Matter of the Plea: 'Tis a ſort of Pleading which is commended by my Lord Coke himſelf, becauſe 'tis to avoid Prolixity.

Hob. 272. An Information was brought againſt the Defendant for a Forgery, ſetting forth, That he had forged a Leaſe of ſeveral Parcels of Land, naming them; whereof a Ground called *Long Meare* was one: The Leaſe being produced, *Long Meare* was not contained in it; the Defendant was acquitted, becauſe by this Defect, it was held not to be the ſame Leaſe; and that it had been better to have made the Information general, that is, to alledge that the Forgery had been made of one Parcel of Land, of which the Proſecutor had been certain, and then he might have added *inter alia*, and this would have been good.

2. The Plea is, That Barbara Strickland was poſſeſſed of this Leaſe, and that ſhe married Marmaduke Dalton by Reaſon whereof they were poſſeſſed in jure uxoris, which was not ſo, becauſe by the Inter-marriage, the Term was veſted in the Husband.

Co. Lit. 300, a. 351. a. Hob. 3. But it was anſwered, That Chattels real are not abſolutely given to the Husband by Marriage, but only conditionally, that is, if he ſurvive; and ſo is the Caſe in Hob. ſſ. A Feme-Sole poſſeſſed of a Term for Years married, then the Husband and Wife mortgaged the Term; the Wife died, the Husband paid the Money and married again, and made his Wife Executrix, and died; the Defendant took out Adminiſtration to the firſt Wife, but it was adjudged againſt him; for though the Husband was poſſeſſed in the Right of his Wife whilſt ſhe lived, yet by the Intermarriage he had Power to alien, and therefore he ſhall enjoy it, if he ſurvive, againſt the Adminiſtrator of the dead Wife.

Pl. Com. 191. If there is a Leaſe made to Husband and Wife, and ſhe ſurvives and marries again, and in Declaring upon this Leaſe 'tis ſet forth, That the Husband and Wife were poſſeſſed, and not that he was poſſeſſed in jure uxoris, it was objected, That the Plaintiff ought to ſet forth, That he was poſſeſſed in her Right, becauſe the Term remained in her notwithſtanding the Coverture: Any one who reads this Caſe in the Commentaries, may eaſily perceive that the Court held this to be a material Objection, though they ruled that Declaration to be good; for they held, that though it was not expreſly alledged that the Husband was poſſeſſed, &c. in her Right, yet it ſhould be ſo intended, becauſe the Declaration ſets forth, That they were married, per quod they were poſſeſſed; ſo that it appearing how he came to be poſſeſſed, that was held ſufficient.

3. The Defendant had no Title before Adminiſtration was granted to him, which was in Feb. 1697. and the Treaſon was committed before that Time; and no Man ſhall be ſuffered to interplead with the King, who had not a Title when that to the King accrued.

To which it was anſwered, That the Term was in being before the Reverſion was deviſed to Sir Roger Strickland, and afterwards too in Conſideration of Law: And though there was a Time when it could not actually veſt in any Perſon before Adminiſtration granted, yet when the Defendant adminiſtred to Maddiſon, he had then a Title to it by relation, to the very Death of Maddiſon, who was the laſt Aſſignee, and he died 1 Septemb. 4 Jac. 2. which was before the Treaſon committed.

No Man can deny, but that the Defendant would certainly have been entitled to this Term, if this Inquiſition had not been found; and though Tenant for Years could not have any monſtrans de droit, or any other Remedy at Law, by Reaſon of the Meanneſs of his Eſtate, to recover the Lands, if once the King got into Poſſeſſion by Vertue of an Inquiſition; yet that Miſchief is now remedied by the Statute 2 Ed. 6. by which 'tis Enacted. §. That if the Title of the Leſſee is not found in the Inquiſition, yet he ſhall enjoy the Term in ſuch Manner as he might have done in Caſe there had been no Office found. 2 Ed. 6. c. 8.

But how ſhall he ſave the Term? Not by traverſing that the Criminal was ſeized in Fee, for let the Inheritance be where it will, 'tis not material to the Leſſee; nay, a Traverſe of the Fee might be an Injury to the King's Title, if it be found againſt him.

Now before this Statute, a Termor could not have any ſuch Traverſe, and 'tis not given by the Statute it ſelf; ſo that the Leſſee hath nothing to do but to ſupply the Defect of the Inquiſition, if his Title as well as the King's is not found in it; and this he muſt do by ſhewing his Leaſe, and not by diſputing the Inheritance.

5. Then it was objected, That a Judgment could not be given according to the Prayer of the Defendant in the Concluſion of his Plea.

The Anſwer was, That the Statute doth not preſcribe any Form of the Judgment; and therefore 'tis more natural to conclude the Plea in the very Words of the Statute, as this is; and if the Precedents are otherwiſe, they paſs ſub-ſilentio, and are not ſo agreeable to the Statute as this is.

So this Plea was adjudged good: And the Judgment in this Caſe was affirm'd upon a Writ of Error, by the Opinions of the two Chief Juſtices Holt and Treby.

The Serjeant tells us *ex abundanti*, that this Inquiſition was void for many Incertainties in it; but was ſo cautious as to mention none, only in general he refers his Reader to find them out amongſt the Caſes following.

The firſt is the Earl of *Cumberland*'s Caſe. *ff.* Upon an Inquiſition after a *diem clauſit extremum*, it was found that King *Ed.* 2. granted the Manor of *Skipton* in *Craven*, to the Lord *Clifford*, and the Heirs of *Lane* 39.

of his Body; and the Reverſion being in the King, they found that *H.* 6. granted it by *ſufficient Conveyance* to another.

Doderidge, the King's Serjeant, objected in the Court of Wards, That the Inquiſition was void for *Incertainty*, becauſe neither the Quality of the Conveyance was found, nor the Time or Place, when or where it was made; the Court held, That notwithſtanding this Objection, it might be good in the Caſe of a common Perſon, but doubted whether it was ſo in the Caſe of the King; for it would be very miſchievous that the King ſhould be diveſted of an Inheritance by ſuch an incertain Office, becauſe it cannot be traverſed.

Ley. 24. Upon the like Inquiſition it was found, That one *Golſey*, at the Day of his Death, was ſeized in Fee of a Meſſuage, Mill and four Acres of Meadow, *&c.* ſcituate *in vel prope Dorcheſter*; and this was held void for the Incertainty, and could not be ſupplied by a *Melius inquirend'*, becauſe thoſe Words *in vel prope* are ſo very incertain, that neither the County, or the Town of *Dorcheſter*, can be intended, out of which the *Viſne* might come, if it could be traverſed; for how can it be near *Dorcheſter*, and not in the Town or County?

Ley. 43. So in *Barber's* Caſe, it was found that he died ſeized in Fee *de & in*
13 *Co.* idem. *duobus Meſſuagiis ſive Tenementis in M.* and of forty Acres of Meadow in the Tenure of *R. Creſwell*, but did not ſay in what *Pariſh*, *Town*, *or County*; for which, and alſo becauſe it was of two Meſſuages *ſive Tenementis*, that Office was held void for the Incertainty, the Word *Tenementum* being *Nomen Collectivum*, and very incertain.

Lane 91. In *Lane* 91. *Iſabel Goodcheap's* Caſe was cited, but I ſuppoſe he means *Iſabel Forteſcue's* Caſe, where the Jury found that ſhe had no Lands but thoſe mentioned in a Schedule to the Inquiſition annexed; and there are ſeveral Lands therein mentioned, but they do not find that ſhe *died ſeized* of them; and this was held void.

In the ſame Book, *fo.* 100, it was found by Inquiſition, That Sir *Thomas Greſham* was ſeized of *divers* Meſſuages in *London*; and upon Demurrer it was held void; for the Word *divers* is ſo general, that it could not be anſwered.

2 *Leon.* 147. In 2 *Leon.* 141. *Raſhton's* Caſe, but both the Name and Page are miſtaken; for 'tis *Ruſhton's* Caſe, *fol.* 147. *ſſ.* It was found by Inquiſition, that *Ruſhton* was poſſeſſed of a Term *quorundam Annorum*; and this being incertain, was held void; for the Term it ſelf ſhould have been found.

In *Moor* 723. it was found, that *Edward* Earl of *Rutland* was ſeized in Fee of and in the Reverſion *ſive* Remainder of the Manor of *Eckering*; and this was held void, becauſe it was ſo incertain that no Man could tell which to traverſe, either the Reverſion *or* Remainder.

Theſe are all the Caſes which I ſuppoſe were cited by the Serjeant himſelf, who was of Counſel for the Defendant, and I wonder he did not cite as many more, which he might have eaſily done, and as little to the Purpoſe; for there is no Queſtion to be made, but an Inquiſition may be void for Incertainty; but he ſhould have told us where this Inquiſition was incertain, and how theſe Caſes are applicable

cable to it; for 'tis not found that Sir *Roger Strickland* was ſeized *de Meſſuagiis ſive Tenementis*, or that he was ſeized of *divers* Meſſuages, or that they were *in vel prope* ſuch a Place, but it was *de Meſſuagiis jacen' infra manerium Dominicum Villam ſive Paroch' de Catterick*; all which Words comprehend the ſame Place; and the one ſhall not be ſuppoſed to extend further than the other.

But after all, the Court was of Opinion, That there is no ſuch Nicety required in an Inquiſition, as in Pleading; for that is only to inform the Court how, and in what Manner Proceſs ſhall iſſue for the King; for his Title accrews by the Attainder, and not by the Inquiſition.

Mandamus.

ſſ. THERE was a Suggeſtion for a Mandamus to the Chancellor or Surrogate of the Biſhop of Cheſter, to ſwear a Churchwarden duly elected to that Office, according to Cuſtom; then there is the Form of the Writ it ſelf, and the Return, that the Perſon complaining was not duly elected.

And thereupon an Action is brought againſt the Chancellor, ſetting forth, That the Plaintiff was duly choſen, and that the Defendant refuſed to ſwear him; that the Plaintiff moved for a Mandamus, and had it granted to ſwear him; then he alledges that he offered himſelf to be ſworn, and that the Chancellor refuſed, and made a falſe Return of the Mandamus, viz. That the Plaintiff was not duly elected, quorum prætextu he was deprived of his Office, &c.

The Serjeant tells us, this Declaration was drawn by the two Lord Chief Juſtices *Holt* and *Pollexfen*, and ſo paſſes from this to the Return of another *Mandamus*; which was brought by one * Parker, to reſtore him to an Attorney's Place in the Court of Exchequer of the County Palatine of Cheſter.

* 1 Vent. 331.

The Return was, That at a Court held there before the Deputy, &c. he commanded Parker to be ſilent, who refuſed, and told the Steward he did not care a Straw for what he could do; and for this he ſuſpended him from his Practice in that Court: And this was held a good Return.

Partition.

Hicks versus *Witchell.*

Hill. 1 & 2 Jac. II. Rot. 1806.

Gloyceſter, ſſ. IN Partition the Plaintiff declared, that Thomas Witchell being ſeized in Fee, &c. deviſed the Tenements to his Wife for Life; and after her Deceaſe, to his Son Tho. Witchell and his heirs Males or Females for ever.

That if Thomas the Son ſhould die without Iſſue, then he deviſed the Premiſſes to his own Daughters, viz. to Margaret, and Mary who married one Hicks, and was the now Plaintiff, and to Elizabeth Witchell, and their heirs, and to the Heirs of the Survivor.

That the Teſtator died, that Thomas the Son died without Iſſue, that Margaret was alſo dead without Iſſue, that Elizabeth married a Man whoſe Name was alſo Thomas Witchell.

That the ſaid Thomas Witchell and Elizabeth his Wife, together with the Widow of the Teſtator, levied a Fine of one Moiety to the Uſe of the ſaid Widow for Life, and after her Deceaſe, to the Uſe of the ſaid Thomas Witchell for Life; then to Truſtees to ſupport contingent Remainders, &c.

That the Widow of the Teſtator died, and thereupon the Plaintiff Mary Hicks entered upon one Moiety, and was ſeized thereof in Fee, and the ſaid Thomas Witchell, by Vertue of the ſaid Fine, was ſeized of the other Moiety for Life; & ſic ſhe and the Defendant Thomas Witchell do hold the Premiſſes in Manner as aforeſaid, inſimul & pro indiviſo, whereupon the ſaid Plaintiff prayeth, that Partition may be made, and that they may hold in ſeveral.

Upon a Demurrer to this Declaration, the Queſtion was, Whether the Writ might be General as this was, or whether it ought to be Special? And the Court were all of Opinion, That this Writ was good, being General.

This is all which is reported in this Caſe, and 'tis (as many other Caſes are) very myſterious, and we are referred to ſeveral Books to find out the Meaning as well as we can; from which I ſhall obſerve.

ſſ. That Joint-Tenants, or Tenants in Common of an *Inheritance*, could not be compelled by the Common Law to make Partition.

31 *H.* 8. *c.* 1. This Inconveniency was remedied by the Statute 31 *H.* 8. by which 'tis enacted, That they ſhall be compelled by a Writ to make Partition.

But this Statute extending only to ſuch who had Inheritances in Lands, and not to ſuch where one had an Eſtate for Life, and the other the Fee-ſimple in the ſame Lands; therefore by another Statute made in the * very next Year; it was provided, That where there is a Joint-Tenant for Life or Years with another Perſon, who hath the Inheritance, they ſhall be compelled to make Partition by Writ out of Chancery *upon his or their Caſe*; which Writ is directed to the Sheriff, and the uſual Form is: *ſſ. Si A. fecerit te ſecurum, &c. ſummoneas, &c. B. &c. oſtenſ. quare cum iidem A. & B. inſimul & pro indiviſo teneant viginti acras terræ.*

* 32 *H.* 8. *cap.* 32.

Now it cannot be properly ſaid, That a Tenant for Life, and he who hath the Inheritance, do hold the Lands *inſimul & pro indiviſo*, by Reaſon of the great Difference which is between their Eſtates; and therefore the Writ ſhould be Specially framed in ſuch Caſe, upon the Statute before mentioned, ſetting forth the Caſe as it is.

Cro. Eliz. 742. In Partition the Defendant pleaded *non tenuit inſimul & pro indiviſo, &c.* and the Caſe was thus. *ſſ. Thomas Sayer* being ſeized in Fee, *&c.* deviſed the Lands to his Wife for Life, and that after her Death, it ſhould remain to *his Iſſue*; he died, leaving two Sons and two Daughters.

The eldeſt Son and one of the Daughters died without Iſſue.

The other Son and *Joan* the Daughter, who married the Plaintiff, entered together, and brought a Writ of Partition, *&c.* But it was adjudged for the Son; for that he did not hold *inſimul & pro indiviſo* with his Siſter, becauſe the Deviſe of the Remainder *to the Iſſue of the Teſtator* ſhall not extend to *all* his Iſſue, and ſo to the Daughter as well as the Son, but to the Son alone; for the Words are doubtful, and in ſuch Caſe they ſhall be conſtrued according as the Law would have given it.

This Caſe was cited, but I cannot ſee to what Purpoſe; it only ſhews where two Perſons may not hold Lands *inſimul & pro indiviſo*, which is a very common Thing: For the Daughter took nothing by the Deviſe, and therefore ſhe could not hold *inſimul* with her Brother.

It had been infinitely more to the Purpoſe, to have cited a Caſe where a Tenant for Life, and he who hath the Inheritance, have been adjudged to hold *inſimul & pro indiviſo.*

Cro. Eliz. 759. In 41 *Eliz.* the Caſe was, *ſſ.* The Plaintiffs were ſeized in Fee of one Moiety, and the Defendant was Tenant in Tail of the other Moiety, Remainder to his right Heirs; and in Partition the Plaintiffs declared, That they and the Defendant *inſimul & pro indiviſo tenent, &c.* Upon *non tenuit, &c.* pleaded, the Jury found this Matter Specially.

'Tis

Tis true, my Lord *Anderſon* was of Opinion, That the Writ in that Caſe ought to have been Special, and framed upon the Statute, and not *inſimul & pro indiviſo* generally; but all the other Judges were againſt him, and they gave this Reaſon for it, *viz.* becauſe the Statute did not direct any Form; and the Clerks in Chancery have deviſed this general Form, adding only *contra formam Statuti*, to ſhew that 'tis grounded on the Statute; and ſo hath the Courſe and Practice been ever ſince.

But it muſt be obſerved, That the Caſe above-mentioned, was between Joint-Tenants and Tenants in Common of an *Inheritance*, and that the Book tells us, That if it had been between Joint-Tenants and Tenants in Common of a *particular Eſtate*, that the Writ ought to be *Special*, ſhewing their particular Eſtates; which is this very Caſe.

Prohibition.

Watkyns verſus *Seaman* and *Web*, Churchwardens of *Painſwick*.

Winford. H. ll. 36 & 37 Car. II. C. B.

ſſ. THE Churchwardens of Painſwick libelled in the Conſiſtory-Court of the Biſhop of Glouceſter, for a Tax made to repair the Church; and after Sentence, the Pariſhioner appealed to the Arches, and ſuggeſts, for a Prohibition to the ſaid Court, that he was poſſeſſed of a Meſſuage, and forty Acres of Land in Painſwick; that the Churchwardens made a Rate of 6 d. in the Pound upon all Lands in that Pariſh, for and towards the Repair of the Church, and for making a new Clock and Chimes, and for Bread and Wine for the Sacrament, for Clerks Fees, and for dividing the Church-houſe into ſeveral Rooms, for the Uſe of the Poor, and for Relief of poor Priſoners in the *Marſhalſea*, and for Expences at ſeveral Viſitations.

That the Proportion of the ſaid Tax to be paid by the Plaintiff was 26 s.

That the Church-houſe, mentioned in the Rate, doth not belong to the Church, but to the Poor.

That by Law the Pariſhioners are not to be taxed towards the Repair of the Church-houſe, or for Money for the Relief of poor Priſoners.

That all Pleas concerning the Validity of Statutes ought to be determined by the Temporal Judges.

That the Defendants had libelled againſt him in the Spiritual Court, ſetting forth the Libel in hæc Verba, and afterwards that he appealed to the Arches where the Plaintiff ſuggeſted theſe Matters, but was not admitted to prove them; and thereupon he now moved for a Prohibition.

Becauſe the Rate was for ſeveral Matters, of which the Spiritual Court had not Cognizance, viz. To repair the Church-houſe, and for Relief of poor Priſoners in the *King's-Bench*, and for Chimes,

which are only Ornaments; and the Charge for that ought not to be on Lands.

But a Prohibition was denied, because the Plaintiff came too late after a Sentente in the Spiritual Court, and an Appeal to the Arches; for in such Cases 'tis always denied, except there is something apparent in the Libel it self, to oust the Spirituaal Court of its Jurisdiction. 2 Rol. Abr. 318, 319. Cro. Car. 456. 2 Cro. 429. March. 153.

This Rate seems to be made only for Repairs of the Church, and for the Houses belonging to it, which were to be repaired at the Charge of the Parish, as 'tis expressly alledged in the Libel.

Then as to the Money for the Relief of poor Prisoners, if it had been expressed in the Libel how much that was, it might have appeared to be a Farthing; 'tis often a Quarter-Part of a Farthing, and therefore 'tis usually put in a Church-Rate, because there is no such Money current to pay it.

And as to Chimes, they are not only Ornaments, but are very useful, and of Delight and Conveniency.

I cannot apprehend what is meant by the Delight and Conveniency of Chimes, when 'tis generally known that they are seldom in Tune.

And here one might have expected from a Man of Judgment and Ability some curious and uncommon Learning upon Chimes; who might have told us, in the first Place, that Clocks were of great Antiquity, but never set up in Churches till the Time, and by the Order of Pope *Gregory* the Great; that Bells are likewise very ancient, but never above two in a Church, till *Turketale* the famous Abbot of *Croyland*, in the Reign of *Edward* the Elder, added six to the two, which were in his Abbey, and so made the first tuneable Ring of Bells in *England*; and from hence we may easily collect that the Invention of Chimes was of a later Date.

Turner versus *Weston*.

Tempest. Trin. 4 Jac. I^r.

Anglia, ff. PROHIBITION to the Mayor's Court of London, suggesting the Statute of 3 Ed. 1. by which all Persons, except the King's Ministers, are prohibited to arrest any one within a Liberty, pulling thro the same, and holding nothing thereof, for any Contracts, Covenants, or Trespasses, made or done out of such Liberty, in Pain to pay double Damages to the Party grieved, and a Fine to the King. Then he suggests that the Defendant levied a Plaint in the Compter against the now Complainant for a Debt of 200l. by Vertue of which he was arrested; and the Plaintiff in that Action declared upon the Bond, and the Plaint was removed into the Mayor's Court, which is still depending; 3 Ed. 1. cap. 35.

then

then he avers that the Cauſe did ariſe extra Juriſdictionem of the City, &c. and ſo prays a Prohibition.

It was objected, That it ought not to go upon this Suggeſtion, but that the Defendant ought firſt to plead to the Juriſdiction, and to ſwear his Plea to be true.

But Oath being made that the Bond upon which this Action was brought, was made extra Juriſdictionem, therefore the Chief Juſtice inclined to grant a Prohibition; and one of the Judges was of Opinion, that it ought to be granted without ſuch a Plea to the Juriſdiction, becauſe there are ſuch Forms in the Regiſter, framed upon this very Statute, without mentioning any ſuch Plea.

Regiſter 98. *a. F.N.B.* 45. *F.* Sid. 464.

This Statute of *W.* 1. is miſtaken in the Chapter, for it is *cap.* 35. and not 33. the Occaſion of making it was thus: Several great Men had Power to adminiſter Juſtice *inter homines ſuos*, that is, amongſt their own Tenants, and within their own Manors; and for that Purpoſe they held Courts within their particular Precincts, to which they might compel their Tenants to come, not as often as they pleaſed, but only once in three Weeks.

In thoſe Courts they held Plea of Contracts, Covenants and Treſpaſſes; but of ſuch only that were made or done within the Manor.

Our Anceſtors not contented to exerciſe this Privilege amongſt their own Tenants; but as it is uſual for all inferiour Courts to enlarge their Juriſdiction, and to aſſume thoſe Powers to which they have no Manner of Right, ſo in a little Time they began to attach Perſons by their Goods to anſwer Suits in theſe Courts for Debts and Treſpaſſes ariſing out of their Franchiſes; and this was upon a falſe Suggeſtion that ſuch Actions were in their Nature tranſitory; and by this Means the King loſt his Fines and Amerciaments, which otherwiſe would accrew unto him upon Judgments obtained in ſuch Actions in his own Courts; and this was the Reaſon of making this Statute.

Batt & al', *Churchwardens*, verſus *Watkinſon*.

Cooke. Mich. 2 W. & M.

England, ſſ. PROHIBITION to the Spiritual Court of York, ſuggeſting a Cuſtom in the Pariſh of Maſſam, for twenty-four of the Chief Pariſhioners to make Rates, and for the Churchwardens to receive all Duties payable for thoſe who are buried in the Body or Iſles of the Church; and if any Pariſhioner refuſed to pay the Duty, then the Churchwardens, by Warrant from the ſaid twenty-four, uſed to diſtrain for it: That all the twenty-four, with the Conſent of the Vicar, always repaired the Body of the Church and Iſles, and that the Churchwardens paid for the ſaid Repairs, and then gave the Accompts to the twenty-four, and were diſcharged by them.

That the Plaintiffs were Churchwardens in the Year 1680, that Customs and Prescriptions are triable at Common Law, and that the Defendant had cited the Plaintiff to appear in the Spiritual Court to give an Account of the Premisses, &c. and thereupon they prayed a Prohibition, which was granted: the Court being of Opinion that this was a good and reasonable Custom.

The Book tells us, this Prohibition was granted upon great Debate, and that at several Times; but doth not so much as mention any Part of the Debate, either at the Bar or Bench; 'Tis sufficient he has said that the Court held the Custom to be good, without citing one Authority to prove it; tho I doubt not but they gave some Reason for this Opinion, and cited some Precedents to maintain it; but I find the Serjeant was resolved to be right in this Case, or at least by omitting the Arguments on either Side, to put it beyond any one's Reach to discover where he was in the Wrong.

Anderson versus *Walker*.

Cooke. Pas. 3 W. III.

PROHIBITION to the same Court, as in the Case before, suggesting, That by the Law of the Land no Man ought to pay for baptizing, &c. against his Will; that Customs and Prescriptions are triable at Law; but that Walker, Curate of Bridlington, had libelled against the Plaintiff Anderson in the Spiritual Court for not paying a Shilling for baptizing Sarah Anderson, his Daughter, setting forth in the said Libel, That there was an ancient Custom in the said Parish for the Parent of a Child born therein, and christened in the said Church by the Curate, or in any other Church by any other Minister, &c. to pay the said Curate one Shilling.

That the Plaintiff had a Child born in the said Parish, and baptized by a Minister, &c. and had not paid the Shilling, &c.

Upon hearing of the Counsel on both Sides, the Court granted a Prohibition.

The Serjeant being of Counsel for the Defendant, hath cited some Cases against the Prohibition.

ff. Godolph. Abr. 427. All that is said there is, That such Offerings which are due to the Vicar for Sacraments, Marriages, Burials, and payable by the Laws and Customs of the Land, before the Statute 2 *Ed.* 6. *cap.* 13. are confirmed by that Statute; from which we are to infer, That Offerings may be due by Custom for Sacraments; but the Book it self is of very little Authority, and therefore I shall proceed to the next, which is of less, and that is 3 *Keb.* 565; but the Serjeant hath mistaken the Folio, for 'tis 575; *Vanacre* versus *Spleen.*

But 'tis not material in what Page it is, for when 'tis found, 'tis nothing to the Purpose; It was no more than a Libel for not repairing *Brit* Church; which is all that is intelligible in the Case.

In *Hob.* 329. *pl.* The Vicar libelled in the Spiritual Court, setting forth a Custom in the Parish, That all Lambs which fell and were bred therein, tho' they belonged to several Owners, yet in respect to the Vicar they were taken as belonging to one Man, and so numbered together, and that the tenth Lamb, thus told, was always the Tithe Lamb, *&c.* A Prohibition was granted in this Case, because it seemed to be a Custom against common Right; for it might happen that a Man might have but one Lamb, and that might be taken for Tithe; and therefore such Customs are triable at Common Law.

Now to make this Case applicable against the Prohibition in the principal Case, the Reader must imagine, that a Custom to pay any Thing for baptizing a Child is against common Right, and that such Customs are triable at Law; but the Misfortune was, That a Prohibition was granted in that Case, which can never be an Authority why a Prohibition should not be granted; and 'tis for that Purpose cited by the Serjeant.

And all which can concern this Matter in the Case cited in *Noy*, 15. is, That a Curate cannot prescribe against an Impropriator.

Colebatch & al' versus *Baldwyn.*

Tempest. Mich. 4 W. & M.

England, *ff.* PROHIBITION: The Libel was against the Churchwardens of Ludlow, for pulling down Seats between the Middle and North Isles of the Church, without Leave from the Bishop, which Seats anciently belonged to the Lord President of Wales; and likewise for making new Seats there, and placing People in them, after Admonition, and without lawful Authority, and without Leave of those Persons who claimed a Title to the said Seats.

The Plaintiffs suggest the Statute of Magna Charta, That no Man shall be dessetsed of his Freehold, but by the Judgment of his Peers, or by the Law of the Land; that all Customs and Prescriptions are triable at Common Law; that in the Parish of Ludlow there is a Custom for the Churchwardens, by the Consent of the Majority of the Parish, for that Purpose assembled, to place and dispose the Seats in that Church to the Parishioners, for the more convenient hearing Divine Service; that the Plaintiffs being Churchwardens, &c. had disposed certain old Seats to the Bailiffs of Ludlow; which being very ruinous, were by the Order of the said Bailiffs pulled down, and new Seats built in their Places, yet the Defendant had cited them into the Spiritual Court, &c.

The Book tells us, That a Prohibition was granted: As to Seats in the Church, the Ordinary hath proper Juriſdiction over them; I mean ſuch as are *in navi Eccleſiæ*, and may place and diſplace whom he thinks fit; but where Cuſtom or Preſcription interpoſeth, there his Juriſdiction ceaſeth, and the Temporal Courts give Remedies upon a Diſturbance. But then it muſt be obſerved, that a Man cannot preſcribe to have a Seat in the Body of the Church generally, without Shewing that he and all thoſe, &c. have Time out of Mind *repaired* it.

Moon verſus *Fawcett*. Mich. 5 W. & M.

Cooke.

England, ſſ. PROHIBITION upon a Libel in the Spiritual Court, before the Commiſſary of Richmond, for theſe Words.

ſſ. *Sarah Fawcett*, Wife of *Richard Fawcett*, is a Whore, and her Husband is a Cuckold; and that ſhe brought up her Husband's Daughter to follow the ſame Trade, and to be a Whore like her ſelf: Meaning thereby that ſhe the ſaid Sarah Fawcett had committed the Sin of Adultery or Fornication, with ſome other Perſon beſides her Husband.

I think the laſt Words might have been omitted, becauſe to ſay a Woman may commit theſe Sins with one *beſides her Husband*, we may infer from thence, that ſhe may commit Fornication or Adultery with him; which looks a little abſurd amongſt common Lawyers, and I believe it is likewiſe ſo amongſt the Civilians.

But the Serjeant tells us, the Plaintiff had a Prohibition *niſi*, which was diſcharged upon his Motion; and here we are again to gueſs at the Reaſon, unleſs we can pick it out of the Caſes cited, which are,

ſſ. 1 *Mod.* 21. where there was a Motion for a Prohibition, for calling the Plaintiff *Whore*, becauſe 'tis a Word of Heat and Paſſion uſed among Perſons when they are ſcolding; but becauſe the Spiritual Courts have a Juriſdiction in Caſe of Whoredom and Adultery, therefore a Prohibition was denied. *Worſley* verſus *Lyddall*, 1 *Mod.* 21. *Sid.* 433. 2 *Keb.* 557. idem. *Sid.* 61.

'Tis true, that before the 8th *Car.* 1. there are many Precedents of Prohibitions in ſuch Caſes; but ever ſince that Time, they have been uſually denied, for the Reaſon above-mentioned.

Houblon

Houblon versus *Milner.*

Winford. Hill. 3 W. & M.

England, ſs. PROHIBITION: The Suggeſtion was, That there is a Cuſtom in London, to puniſh Whores by Carting and Whipping; that the Words following are actionable there by a Cuſtom, viz. You are a Common Woman, and ſuch Women as you are, never have any Children; then he avers, That if the Words in the Libel were ſpoken, it was in London, in the Pariſh of St. Mary Wolnoth, where the Woman was married, and ſtill liveth; and though the Defendant might have a Remedy at Law againſt the now Plaintiffs, for ſpeaking theſe Words, yet he exhibited a Libel, and therefore prayed a Prohibition.

But it was denied, becauſe the Cuſtom of London extends only where the Woman is called Whore, and not to ſuch Words out of which it may be collected ſhe is ſo.

Style 69. and not 61. 229, 245.

There are ſeveral Cauſes cited out of Style, which prove that it is actionable in London by the Cuſtom, &c. to call a Woman Whore.

The Caſes which were cited for the Defendant, to ſhew why a Prohibition ſhould not go, were;

ſſ. 27 *H.* 8. 14 *B.* That an Action on the Caſe doth not lie for calling a Man Adulterer, becauſe 'tis an Offence cognizable in the Spiritual Court; and the Party may be puniſhed there if the Words are true; and in ſuch Caſes Prohibitions are not granted.

Hollingſhed's Caſe, Jones 246. *Car.* 229. idem.

In *Jones* 246. this Diſtinction was made; Where the Libel is for calling the Woman *Whore*, no Prohibition ſhall lie; becauſe if the Matter is true, 'tis an Offence of which the Spiritual Courts take Notice, and puniſh the Offenders; but if it is for calling a Woman *Bawd*, this being an Offence of a mix'd Nature, and puniſhable either at Common Law, or in the Eccleſiaſtical Court; if the Suit is commenced there, a Prohibition ſhall not go, becauſe the Party hath determined his Election, by exhibiting his Libel in that Court.

My Lord *Rolle* in abridging this Caſe, carries this Diſtinction a little farther, and tells us, That a Prohibition ought to go for calling a Woman *Bawd*, becauſe ſhe cannot be indicted for it; but if it had been ſaid that ſhe keeps a *Bawdy Houſe*, it had been otherwiſe, becauſe that is an Offence which may be proſecuted at a Leet.

But I think none of theſe Caſes make any Thing to the Purpoſe for which they were cited, becauſe they are put at large; but the Words in the principal Caſe, are confined to a particular Place, by a Cuſtom peculiar to that Place and to none elſe.

Lord *Rolle*'s *Abr.* 145. *Num.* 10. is cited, but there is no ſuch Number in that Page, nor any Thing there agreeable to this Caſe, ſo that it muſt be a Miſtake.

The

The Serjeant having taken up two Lines, in telling us who were for the Plaintiff and for the Defendant, which is a material Circumstance, and seldom omitted by him, especially where he was a Counsel on either Side, adds this *Nota* of his own.

ſſ. Nota, it is ſuggeſted, That if the Words were ſpoken, it was in London, which is not a poſitive Averment, as it ought to be, that they were ſpoken there.

He tells us, So it was reſolved in the Caſe of Day and Pitts. 1 *Vent.* 10.

ſſ. A Motion was made for a Prohibition, to ſtay a Suit in the Spiritual Court, but doth not ſay *where*, ſuggeſting that it was for calling the Plaintiff old Thief and old Whore; and that if any ſuch Words were ſpoken, it was *at the ſame Time*: This Suggeſtion was held ill, becauſe the Words were not fully confeſſed, which they ought to be, and pleaded in the Court; and then if they refuſe the Plea, to move for a Prohibition.

Morton verſus *Briggs*.

Winford. Trin. 8 W. III. Rot. 1300 & 1302.

England, ſſ. PROHIBITION to the Spiritual Court, ſeveral modos decimandi, viz. That the Plaintiff was ſeized in Fee of a Meſſuage and forty Acres of Land in Kirkburton, that the Rectory of that Church was in ----, and that the Duke of Norfolk was ſeized thereof in Fee; then he preſcribes to pay to the Rector yearly, two Shillings and four Pence half-peny farthing, upon St. Mark's Day, in full Satisfaction for the Tithes of Grain and Hay, and an half-peny to the Vicar, on Midſummer Day, for every Sheep depaſtured there, either in Summer or Winter, in full Satisfaction for Tithes of Wool: And for thoſe who had Paſture Lands, to pay a Peny half-peny for every Cow with a Calf, not exceeding five Cows; and if five Cows having Calves, 1 s. 4 d. if ſix, 2 s. 6 d. for ten Cows, &c. 2 s. 8 d. and for every Cow not having a Calf, 1 d. in full Satisfaction for Cows, Calves, Herbage and Paſture-Land in the ſaid Pariſh; for every Milch-Cow, 1 d. for Tithe of Milk; and two Hens in Satisfaction of Tithe-Eggs.

The Defendant pleads, That he is Vicar, &c. and that Tithe-hay ought to be paid in kind, and Tithes for the Agiſtment of barren Cattle, for which he libelled againſt the Plaintiff in the Spiritual Court, and traverſed the Cuſtom of paying two Shillings and four Pence half-peny Farthing, for the Tithes of Grain and Hay; and the Payment of an half-peny for every Sheep, and traverſed the Cuſtom for Payment of a Peny half-peny for every Cow, &c.

The Plaintiff replies and joins Iſſue upon the Preſcription, and had a Verdict as to all, beſides the modus as to Wool.

But it was moved in Arrest of Judgment, That the Prescription to pay one Peny half-peny for every Cow with a Calf, &c. in Satisfaction for the Tithes of Cows and Calves, and for the Herbage and Pasture of the Land, was not good, because Tithes ought to be paid for both; and Payment of Money for Tithes of one Thing, viz. for Cows, could not be any Satisfaction for the Tithes of the Herbage and Pasture of Lands.

Cro Eliz. 446. Moor 277, 445.

The Prescription likewise as to Cows was held void, because it goes no farther than the Number of six; and doth not say what is to be paid when more than six, and under ten; nor what is to be paid when more than ten; and therefore a Consultation was awarded, both as to the Tithes of Herbage and Pasture-Lands, and Tithes for Cows and Calves.

I think this Case is reported very right, and the Books cited are *ad idem*, which not being very usually done, I must therefore take Notice of it, to do Justice to the Author where he doth it to himself.

Osborne versus *Pool*.

Tempest. Pasch. 10 W. III.

England, ss. PROHIBITION to the Court of Arches, upon an Appeal from the Consistory Court of the Bishop of Litchfield, on a Libel for these Words spoken of a Clergy-Man: ss. You are a pitiful pimping Rascal; the Plaintiff suggests, That the Words were spoken in Passion, being provoked by the Defendant, who said, That the Plaintiff was a Beggar, and was going to run his Countrey, and if he could ruin him, then he should have his End; and that he used to steal his Neighbours Ducks and Hens; but a Consultation was granted.

The Serjeant says, It was granted upon Debate, and that he was of Counsel for the Defendant; and yet doth not tell us any Part of that Debate, nor of his own Argument, which he seldom omits where it is of any Length.

Burton & Ux' versus *Sharpe*.

Winford. Mich. 11 W. III.

PROHIBITION to the Consistory Court of the Archbishop of York, to stay a Suit commenced there by the Grandmother, to repeal Letters of Administration granted to the Aunt of the Intestate.

The Plaintiff ſuggeſted the Statute 21 H. 8. by which the Ordinary is to grant Adminiſtration to the next of Kin; then ſets forth, That Mary Sharpe died inteſtate, that Adminiſtration was granted to the Plaintiff, who was her Aunt and next of Kin; and thereupon the Authority of the Ordinary of committing Adminiſtration quoad bona & catalla of the Inteſtate, was determined: That Mary Sharpe, the Grandmother of the Inteſtate, had cited the Plaintiff to repeal this Adminiſtration, &c. in contemptum Domini Regis, and thereupon prayed a Prohibition. 21 H. 8. c. 5.

There was a Rule for a Prohibition *niſi cauſa, &c.* but that Rule was diſcharged upon hearing Counſel on both Sides; and here our Author doth not ſo much as tell who thoſe Counſel were, which would have added ſomething to the Length of the Report; from which we may conclude, that he was on neither Side.

It ſeems the Court was at firſt againſt any Conſultation, becauſe the Rule was for a Prohibition *niſi*; but they altered their Opinion upon hearing Counſel: Now though this is a very conciſe Way of reporting, and therefore ſecure from Miſtakes; yet it would have been more ſatisfactory to have given ſome Account of the Arguments, and the Reaſon why the Court diſcharged the Rule for a Prohibition.

Machin verſus *Maulton.*

Hill. 13 W. III. C. B.

Nottingham, ſſ. PROHIBITION to the Spiritual Court, in a Suit there for Tithes in kind; the Plaintiff ſuggeſted an antient Agreement by Parole, between the Predeceſſors of the Defendant, and the Proprietors of Land-holders of the Pariſh, that the Lands, &c. ſhould be incloſed for the Improvement thereof, and that the Rector and his Succeſſors ſhould have the tenth Acre of all titheable Lands, in Satisfaction of all Tithes, &c. which ſhould be likewiſe incloſed for him; that in Purſuance of this Agreement, the Lands were incloſed, and ten Acres for the Rector, for the Uſe and Benefit of him and his Succeſſors; that the Defendant ever ſince he was Rector, had entered and enjoyed the Profits of the ten Acres, according to the aforeſaid Agreement; and the Pariſhioners were diſcharged all that Time from paying Tithes in kind; then he ſets forth the Libel, and prayeth a Prohibition.

The Defendant traverſed the Agreement, and the Plaintiff took Iſſue upon the Traverſe, and had a Verdict; and after ſeveral Motions in Arreſt of Judgment it was confirmed.

Thompſon

Thompſon verſus *Davenport.*

Tempeſt. Mich. 13 W. III.

England, ſſ. PROHIBITION to the Conſiſtory Court of the Archbiſhop of York; the Plaintiff ſuggeſted, That all Cuſtoms and Preſcriptions are triable at Law, yet the Defendant had libelled againſt him in the Spiritual Court, ſetting forth a Cuſtom within the Pariſh of Elinton in Derbyſhire, for every Woman who is a Pariſhioner and Inhabitant there, and marrying with a Licence, that their Husbands ſhould at the Time of Marriage, or ſoon after, pay to the Vicar 5 s. as an accuſtomed Fee for the Marriage: That Martha Waterhouſe was a Pariſhioner of Elinton, and that ſhe married the Plaintiff Thompſon, and that he had a Licence to diſpence with the Publication of the Banns of Matrimony, &c.

There was a Rule for a Prohibition Niſi, which the Serjeant moved to diſcharge.

But he tells us he could not prevail, and I cannot ſee any Reaſon why he ſhould; for the Caſe which he cited out of *Rolle* is directly againſt him; it was thus,

2 *Rol. Abr.* 307. *pl.* 18.

ſſ. There was a Libel in the Spiritual Court, ſetting forth a Cuſtom, That if a Pariſhioner of *B.* dieth in that Pariſh, and is buried in another in *London*; and if a Gown, Pulpit-Cloth and Gloves are given to the Parſon, that he ought to have them where the Perſon died, and not where he was buried; and a Prohibition was granted to try this Cuſtom.

He tells us, he cited ſome other Caſes, it may be to as little Purpoſe as this was; but he doth not mention any more.

In the principal Caſe, the Court held the Cuſtom to be unreaſonable.

Burton verſus *Cookerman.*

Mich. 13 W. III.

PROHIBITION to ſtay a Suit in the Spiritual Court, upon Articles exhibited there, ſetting forth, That the Defendant was Curate of Welwick in Yorkſhire, and Sequeſtrator of the Tithes for the Uſe of the next Incumbent; then ſets forth a Cuſtom that all Tithes (except of Corn) ought to be paid to the Vicar; that the Plaintiff had not paid Tithes of Rape-ſeed, nor for the Agiſtment of fatting Oxen, &c.

The Plaintiff ſuggeſts, That Thomas Crathorne was ſeized of the Rectory of Welwick, in Fee; that there were 100 Acres of Glebe Land in the Pariſh, belonging to the Rectory; and that the Rector and his Predeceſſors, and his and their Tenants, held the ſaid Lands diſcharged of Tithes; that Crathorne demiſed the Glebe to the Pariſh.

Then he ſets forth that Paragraph of the Statute of Ed. 6. by which 'tis enacted, That none ſhall be compelled to pay Tithes for Lands; which by the Laws and Statutes of the Realm, or by any Privilege or Preſcription are not chargeable therewith, or are diſcharged by any real Compoſition; and that all Preſcriptions are triable at Common Law, &c. 2 & 3 Ed. 6. cap. 13.

The Court held this was a good Suggeſtion for a Prohibition.

But it could not, for the Reaſon given in *Blinco*'s Caſe, there cited, which is reported in ſeveral Books: *ſſ.* That where the Parſon hath the Glebe and great Tithes, and the Vicar the ſmall Tithes; that ſuch Vicar ſhall not leave the Tithes of the Glebe, becauſe *Eccleſia non debet decimas Eccleſiæ*, unleſs the Glebe is let; and then the Leſſor ſhall have the great, and the Vicar the ſmall Tithes; but in the principal Caſe the Glebe was let, and therefore the Vicar ought to have the ſmall Tithes. *Cro. Eliz.* 479. *Moor* 457. 2 *Rol. Abr.* 335.

The Court was alſo of Opinion that the Suit was well brought in the Spiritual Court, in the Name of the Curate and Sequeſtrator; for by the Statute of 28 *H.* 8. the Tithes of a Benefice, during the Time 'tis void, ſhall go to the next Incumbent, allowing the Charge of the Cure; and if the Pariſhioners refuſe to pay it, they may be cited in the Spiritual Court; and if they get a Prohibition, yet a Conſultation ſhall be granted; the Form of which is in the Regiſter. 28 *H.* 8. *cap.* 11. *F.N.B.* 52 *b.* *Regiſter* 51.

But in the principal Caſe there were Affidavits produced, that the Lands were not Glebe; and therefore a Prohibition was denied.

Johnſon verſus *Wrightſon.*

Winford. Paſ. 13 W. III.

IN PROHIBITION to the Spiritual Court, upon a Libel there againſt an Executrix, upon a Cuſtom for a Mortuary; the Plaintiff ſuggeſts the Statute 21 H. 8. which prohibits the taking any Thing for a Mortuary, where by Cuſtom it hath not been uſually paid, and avers, that there is no ſuch Cuſtom in the Pariſh of Manchester, where the Teſtator died. 21 H. 8. cap. 6.

It was argued for the Plaintiff, That Mortuaries are due by Cuſtom, and not by Law; which Cuſtom muſt be agreeable to the Rules of the Common Law, viz. Time out of Memory, &c. But if any Proof can be made of an Uſage for 20, 30, or 40 Years, 'tis ſufficient to eſtabliſh a Cuſtom according to the Canon Law. Cro. Eliz. 151. 3 Mod. 268. 1 Vent. 274.

Now when ſuch Cuſtoms are denied, 'tis reaſonable they ſhould be determined by a Trial; and where ſhould the Trial be, but at Common Law.

13 *Rep.* 18. 2 *Rol. Abr.* 307. *Sect.* 19. 13 *Rep.* 37. *Godb.* 163.

Becauſe Cuſtoms are Part of the Laws of the Realm; and therefore, where a Cuſtom is alledged *de modo decimandi*, it ſhall be tried at Common Law; ſo where a Cuſtom is alledged for the Pariſhioners to chuſe a Pariſh Clerk, and the Parſon chuſes another by Vertue of a Canon, this Cuſtom ſhall be tried at Common Law, for the Reaſon above-mention'd; but my Lord *Cooke* hath a very notable Pun for ſuch a Trial, for he ſays, 'tis becauſe the *Canon* Law cannot endure *Gun*-ſhot.

But it was argued on the other Side, that the Spiritual Court had the original Juriſdiction of Mortuaries; and if ſo, 'tis reaſonable that all its Dependences ſhould be tried there.

As in 10 *H.* 4. *pl.* 2. A *Præmunire facias* was brought againſt the Vicar of *S.* for ſuing in the Spiritual Court for a Heifer; the Defendant pleaded a Cuſtom in the Pariſh, that he and his Predeceſſors always had the beſt Beaſt of every Pariſhioner dying there, which was due as a Mortuary; and that *A. B.* died poſſeſſed of the Heifer which the Defendant would have ſeized; but by Contrivance of the Plaintiff it was drove away; whereupon he ſued him in the Spiritual Court to produce the Heifer; and tho' it was objected that this being only a Chattle, and the Queſtion being about the Poſſeſſion, it ought to be tried in the Temporal Courts; yet the Plea was held good, becauſe thoſe Courts have no Juriſdiction of Mortuaries, nor of any its Dependences.

So in 2 *H.* 5, 10. An Action of Treſpaſs was brought againſt the Defendant for taking a Horſe, the Defendant pleaded to the Juriſdiction of the Court, for that he was Vicar of *G.* and the Plaintiff was Parſon of the ſame Church; and that *R.* died poſſeſſed of the Horſe in the ſaid Pariſh, and that the Defendant took it as a Mortuary, and ſo did the Plaintiff likewiſe as Parſon of the ſame Church.

Now this had been a good Plea to the Juriſdiction, if the Property of the Horſe had been admitted to be in the Pariſhioner whilſt he was living; but that was denied, ſhe had only the Poſſeſſion; but the Plaintiff claimed the Property.

In *Keilway* 110, 111. There was a Deviſe of Goods to *W. Son and Heir* of *R.* The Legatee ſued the Executors in the Spiritual Court, who plead that he was not Son and Heir of *R.* It was held that if Iſſue be joined on that Point, it ſhall be tried in that Court, becauſe it depends upon the principal Matter, *viz.* the Deviſe of the Goods, of which that Court hath an original Juriſdiction; but if the Iſſue had been of a Thing merely temporal, 'tis otherwiſe: As if a Suit be there for Subſtraction of Tythes in ſuch a Pariſh, and the Defendant plead that he took them away in ſuch a Place, which is in his own Pariſh, and ſo they were at Iſſue in which Pariſh they were taken; this ſhall be tried in the Temporal Courts, becauſe the Iſſue is concerning the Boundaries of a Pariſh, which is merely temporal.

The

The reſt of the Caſes cited by the Serjeant are ſomething wide of the Matter; for he tells us in the Beginning of the Paragraph, 'tis beyond all Queſtion that the Spiritual Courts have an original Cognizance of Mortuaries, ſo that he need not cite any Caſes to prove that he is only to prove this Sequel: *ſſ.* That becauſe they have an original Juriſdiction of Mortuaries, therefore all its Dependences muſt be tried there.

Now my Lord *Coke* in 2 *Inſt.* 491. paraphraſes upon the Word Mortuary, and tells us, That the Statute 21 *H.* 8. *cap.* 6. allows the Conuzance thereof to the Court-Chriſtian; but not that the Dependency on it ſhall be tried there.

'Tis true, he ſays, That if a Penſion is claimed of a Parſon by a Churchman, in lieu of Tithes, that the Spiritual Court hath a Juriſdiction; but then he diſtinguiſhes between a Penſion which began upon ſome Order or Decree made by an Eccleſiaſtical Judge, where a Controverſy happened about Tithes, ordered the Enjoyment by one, and the Penſion to be paid by him to the other; that for ſuch a Penſion the proper Remedy is in the Spiritual Court, becauſe at firſt it was an Eccleſiaſtical Act, and founded upon the Decree of an Eccleſiaſtical Judge; but where a Penſion is claimed by Preſcription, or is granted by Deed, there 'tis otherwiſe; for tho' it hath a Dependency upon Tithes, which is the principal Matter, yet Cuſtoms and Preſcriptions are to be tried at Common Law.

The Year-Book 20 *H.* 6, 17. is no more than this:

ſſ. A Clergyman brought an Action of Treſpaſs againſt a Layman, for taking away Corn in Sheaf; the Defendant juſtifies the taking for Tithes, by Vertue of a Leaſe thereof made to him by another Clergyman; the Plaintiff replies, That the Sheafs taken were a Portion of Tithes belonging unto him; and upon Demurrer, it was objected, That both Parties claiming Tithes, the Plaintiff could not bring an Action of Treſpaſs, but ought to ſue for the ſame in the Spiritual Court; no Judgment was given.

All that is ſaid in *B.* 50. *litera Q.* relating to this Matter is, That a Prohibition ſhall not be granted in Suits for Tithes and Mortuaries.

And the Caſe in *Sid.* 260. was thus: *ſſ.* A Vicar libelled in the Spiritual Court for a Mortuary, the Impropriator moved for a Prohibition, ſuggeſting that the Mortuary was not due to the Vicar by Cuſtom, *&c.* but to him, and that Cuſtoms are triable at Common Law; but a Prohibition was denied, becauſe that Cuſtom was not controverted, for they both claim by it; and it was admitted on both Sides; they only differed in the Perſon to whom it ſhould be paid.

Then it was inſiſted on the Behalf of the Defendant, that the Spiritual Court had received and allowed his Plea.

But it was anſwered, That the Allegation of the refuſing the Plea is not traverſable.

For 'tis no more than to enforce the Contempt; 'tis no Matter of Subſtance, 'tis the Suggeſtion only which is material; and no Inſtance can be given of any Iſſue taken upon the Refuſal of a Plea. *Cro. Eliz.* 511, 655. 13 *Rep.* 44.

After

After long Conſideration had of this Caſe, it being a controverted Point, a Prohibition was granted; and that the Plaintiff ſhould declare in an Attachment upon a Prohibition to try the Cuſtom.

Durrant verſus *Booty.*

Winford. Paſ. 13 W. III.

PROHIBITION to the Spiritual Court of Norfolk, where the Libel was for Tithes of the After-Math of Clover-Graſs in five Acres, called the Chequor-field.

The Plaintiff ſuggeſts a Cuſtom in the Pariſh, &c. to pay the 10th Cock of the firſt Math of Graſs, in full Satisfaction for Tythes both of that and the After-Math, and that the Vicars have always accepted thereof; and then ſets forth, That he removed the Clover-Graſs in the Chequor-field, and that he ſet forth the 10th Cock for the Vicar, &c.

The Court inclined at firſt that a Prohibition did not lie in this Caſe, becauſe the Plaintiff had not alledged a Cuſtom to pay the 10th Cock of Clover-Graſs, but of Graſs generally; afterwards a Prohibition was granted; for ſuch a Preſcription is good both for the firſt and ſecond Math of common Graſs; and the Court would not make any Diſtinction between that and Clover-Graſs.

2 Cro. 116. Yelv. 86. idem.

Snowling & Ux. verſus *Nurſey.*

Tempeſt. Mich. 13 W. III. Rot. 364.

Suffolk, ſs. ATTACHMENT on a Prohibition to the Commiſſary's Court, &c. in a Suit there to diſſolve the Marriage of the Plaintiff with the Daughter of the Siſter of his firſt Wife.

32 H. 8. cap. 38.

The Plaintiff ſuggeſts the Statute of H. 8. by which 'tis enacted, That all Marriages which within the Church of England ſhall be contracted between lawful Perſons, and ſolemnized in the Face of the Church, and conſummate with bodily Knowledge, ſhall be accounted lawful, good, juſt, and indiſſolvable; and that all Perſons ſhall be lawful that be not prohibited by God's Law to marry, and that no Reſervation or Prohibition, God's Law except, ſhould trouble or impeach any Marriage without the Levitical Degrees; then he avers, that he and his Wife being lawful Perſons to marry, and without thoſe Degrees, and not prohibited by the Law of God, or any other Law, did marry, &c. and then he ſets forth the Libel, and that

that a Prohibition was delivered to the Defendant, but that he proceeded in contemptum Domini Regis, &c.

Upon Demurrer to this Declaration, a Conſultation was awarded.

All that may be collected from the Book why it was granted is, becauſe this Marriage is expreſly prohibited by the 99th Canon, ſet forth in 1603; which is, That no Perſon ſhall marry within the Degrees prohibited by the Laws of God, and expreſſed in a Table ſet forth by Authority in the Year 1563; and all Marriages ſo made and contracted ſhall be adjudged inceſtuous and unlawful, and conſequently ſhall be diſſolved as void from the Beginning; and the Parties ſo married ſhall by Courſe of Law be ſeparated.

Some Caſes were cited to prove thoſe Canons to be binding.

ſſ. By the Statute of 25 *H.* 8. *cap.* 19. it is provided, That all Canons not repugnant to the King's Prerogative, nor to the Cuſtoms, Laws, or Statutes of this Kingdom, ſhall be uſed and executed.

This Convocation for the Province of *Canterbury* was holden at *London*, in 1603, by the King's Writ, and they had a Licence under the Great Seal to conſult and agree to ſuch Canons as they ſhall think fit.

And this very Canon was then made, and amongſt many others had the Royal Aſſent, and was juſtified and confirmed by Letters Patent, according to the Statute 25 *H.* 8.

So that 'tis * a lawful Canon, and not only ſo, but a Canon warranted by Act of Parliament: Now a lawful Canon is the Law of a Kingdom, as well as an Act of Parliament; and whatever is the Law of the Kingdom, my Lord *Vaughan* tells us, is as much a Law as any Thing elſe that is ſo, becauſe what is a Law doth not *incipere magis aut minus*; ſo that it is a Law, and now in Force.

* *Moor* 783. 2 *Lev.* 222.

Vaugh. 327.

Then as to the Legality of this Marriage, 'tis true, that Prohibitions have been granted upon this Statute, where the Marriage was not expreſly prohibited by the *Levitical* Law; and ſo was † *Man*'s Caſe, as reported by Serjeant *Moor*, who *Anno* 33 *Eliz.* was tried in the High Commiſſion-Court for marrying his Wife's Siſter's Daughter; (which is this very Caſe) The Book tells us, That a Prohibition was granted, becauſe the Marriage was not prohibited by the *Levitical* Law; which my Lord *Vaughan* ſaid is no Manner of Reaſon; for ſome Marriages muſt be prohibited within the *Levitical* Degrees, which are not particularly expreſſed in the 18th of *Leviticus*; as the Marriage of the Father with his Daughter, or the Grandſon with his Grandmother, or the Uncle with his Brother's or Siſter's Daughter; theſe are all within the *Levitical* Degrees, but not mentioned in that Chapter.

Moor 907. *Cro. Eliz.* 228.

Beſides, Juſtice *Croke*, who reports the ſame Caſe, ſaid, That at firſt there was a Prohibition, but that afterwards a Conſultation was granted; therefore the Court muſt hold that Marriage to be within the *Levitical* Degrees, otherwiſe the Prohibition would have ſtood.

A Man is prohibited to marry any that are near of Kin to his Wife, upon theſe Words in *Lev. cap.* 18. *ver.* 17. *ſſ. Thou ſhalt not*

uncover the Nakedneſs of a Woman and her Daughter, neither ſhalt thou take her Son's Daughter, or her Daughter's Daughter, to uncover their Nakedneſs; and the Reaſon is there given, *viz. for they are her near Kinſwomen.*

Now 'tis plain that none of the Wife's Kindred are mentioned in the Text, but her *Daughters*; yet no Man will deny but that her Mother and her Siſter, tho' not expreſly named, are comprehended in the Reaſon of this, as well as the Daughter; for the Marriage with her Daughter is prohibited, becauſe ſhe is the Wife's near Kinſwoman; and 'tis manifeſt that the Mother and Siſter are likewiſe her near Kinſwomen in the more ſtrict Senſe.

2 *Lev.* 254. *Ray.* 464. 2 *Jones* 118. *idem.*

The Caſe of *Worthy* and *Watkinſon* muſt be greatly miſtaken by Serjeant *Levinz*, who reports, That a Prohibition was prayed to ſtay a Suit in the Conſiſtory Court of the Archbiſhop of *York* to diſſolve a Marriage, where a Man had married the Daughter of his Wife; and the Reaſon given for a Prohibition was, becauſe 'tis not within the *Levitical* Degrees; when 'tis expreſly otherwiſe, as abovementioned.

Juſtice *Raymond*, who reports the ſame Caſe, ſays, the Marriage was with his Siſter's Daughter; if he had ſaid with his Wife's Siſter's Daughter, he had been right; for ſo the Truth was, and ſo it is in Juſtice *Jones*'s Report.

Now all that was ſaid in that Caſe may be applied to this, for they are the ſame in Effect. That the Prohibition in the *Levitical* Law muſt extend to all Caſes within the ſame Reaſon, and by the 14th *Verſe*, *cap.* 18. the Nephew is expreſly prohibited to marry his Father's Brother's Wife, becauſe ſhe is his Aunt; *a pari ratione* the Plaintiff in this Caſe muſt be prohibited to marry his Wife's Siſter's Daughter, becauſe he is her Uncle; and ſo a Conſultation was granted.

Quare

Quare impedit.

OUR Author begins this Title with ſome of Juſtice *Warburton's* Manuſcripts, but without Term or Number-Roll, or any Argument or Debate on them; and the firſt was in the Reign of Queen *Elizabeth*, when *Popham* was Attorney General.

Domina Regina verſus *Clarke*, *Blower* and *Auſtin*.

QUARE impedit to preſent to the Church of Church-Eaton, wherein the Plaintiff declares, That King Edward VI. being ſeiz'd of the Advowſon in Fee, preſented one Bolt, who was admitted, &c.

That the Queen granted the Advowſon to my Lord Darcy in Fee.

Then he ſets forth the Statute 21 H. 8. by which it was Enact- 21 H. 8.
ed, That if any Perſon having a Benefice with Cure of Souls, being of cap. 13.
the yearly Value of 8 *l.* or above, accept another, with Cure of Souls, and be inſtituted and inducted in the Poſſeſſion of the ſame; immediately upon ſuch Poſſeſſion, the firſt Benefice ſhall be void, and that it ſhall be lawful for the Patron to preſent another, as if the Incumbent had been dead, *&c.*

That whilſt the ſaid Bolt was Incumbent, the Church was a Benefice with Cure, &c. of the Value of 8 *l.* per Annum, and upwards; and that he took another Benefice with Cure, &c. ſo that being void, the Queen ought to preſent by Lapſe.

The Defendant Clarke pleads, That he did not diſturb the Queen's Preſentation, and thereupon they were at Iſſue; the Defendant Blower pleads a Proviſo in the ſaid Act of Parliament, viz. Paragr. 10.
That every Spiritual Perſon of the King's Council, may have a Licence or Diſpenſation to keep three Benefices with Cure, and the

Chap-

Chaplains of the King, Queen, the King's Children, Brethren, Sisters, Uncles and Aunts, may each of them keep two.

Paragr. 20. Then he pleads another Paragraph in the same Act, viz. That a Spiritual Person being the King's Chaplain, may accept (of the King's Gift) any Benefices to what Number soever, without incurring the Penalty of the Act.

That before the said Bolt accepted the second Living, he was Chaplain to Queen Mary, who was seized of the Manor of Rolston, to which the Advowson of the Church did belong; that the same being void by the Death of one Murrey, the Queen presented Bolt.

That the Lord Darcy granted the Advowson of Church-Eaton, to one Underwood, and so by several Grants conveys a Title to himself.

That the Church being void by the Death of Bolt, this Defendant Blower presented the other Defendant Austin, who was admitted, &c. Austin pleads the same Plea in Effect, which is all the Case.

THE next is a Quare impedit brought by the Queen, to present to the Church of Chalfount, wherein the same Statute is recited; then it sets forth, That Michael Bullinger, late Bishop of Lincoln, was seized of the said Advowson in Fee, in Right of his Bishoprick; that he collated George Garth thereunto, that it was a Benefice with Cure of Souls, and of the yearly Value of 8 l. and upwards; that Garth being duly qualified, Anno 8 Eliz. accepted Kenyth Hempsted and Wallington in Hertfordshire; and being instituted and inducted into the same, Chalfount became void, and so continued for two Years and upwards, and so it belonged to the Queen to present.

The Defendant confesseth, That the Bishop was seized, and that he presented Garth, who was qualified, and did accept another Living, and was afterwards inducted into Wallington: That Bullinger was translated to Worcester, and one Thomas Cooper was made Bishop of Lincoln, by Reason whereof he was seized of the Advowson of Chalfount in Fee, &c. and that Garth having two Livings, accepted a Third, viz. Wallington, into which he was inducted; so that Chalfount became void. * Bishop Cowper presented Juce; that the said Bishop was afterwards translated to Winton, and that William the now Defendant, was made Bishop of Lincoln; That Chalfount being void by the Death of Juce, the Bishop collated Thomas Leigh.

* This was two Years after it was void.

It appears that Bishop Cooper did not present Juce, till two Years after Garth had accepted Wallington, yet he dying Incumbent of Chalfount, the Queen hath lost her Presentation by Lapse.

And

And to prove this the Serjeant cites *Beverly's* Case, which is reported in several Books, and it was thus. *Moor* 224, 241, 269. *Cro. Eliz.* 44. *Owen* 2. and 148.

Simon Kelham being Incumbent on the Rectory of *Somerby* in *Lincolnshire*, took the Church of *Rappesly*, without any Dispensation, and held both for twelve Years.

Beverly the Patron, by Reason of this Plurality, presents one *Berry* to the Church of *Somerby*, who was instituted and inducted, and held it many Years, and died Incumbent.

The Queen apprehending that her Title by Lapse in the Time of *Kelham* ought to be served, presented one *Cornwall*; and her Presentation was held void, because she was entitled to the next Turn only: Now that was served by the Patron's presenting *Berry*; and the Queen might have presented at any Time whilst he was Parson; yet he *dying Incumbent*, a new Title is given to the Patron, and by consequence the Queen can have none. 2 *Cro.* 216.

Dominus Rex versus *Gibson.*

Cooke. Hill. 2 & 3 Jac. II. Rot. 1918.

Sussex, ss. QUARE impedit to present to the Church of Thorndon, setting forth the Statute of 31 Eliz. by which it is Enacted, That if any Person, for any Reward or Assurance, directly or indirectly taken, do present or collate any Person to any Benefice with Cure of Souls, Dignity, *&c.* or give or bestow the same for any corrupt Consideration, it shall be void, and the Queen may bestow the same for one Turn only; and that he who gives or takes any Money or Reward, or makes any Bond, Promise or other Assurance, shall forfeit double the Value of one Year's Profit of such Benefice, and shall for ever be disabled to hold the same Living. 31 Eliz. c. 6.

Then the Plaintiff sets forth, That Thorndon is a Benefice with Cure of Souls, and that the same being void, a simoniacal Agreement was made with Anne Welham, Mother and Guardian of Isaac Welham an Infant, who was seized of the said Advowson in Fee, and Edward Crew, that the said Isaac should present the said Crew; and that in Consideration thereof, the said Crew should pay unto her 250l.

That in Pursuance of the said simoniacal Agreement, Isaac Welham, by the Procurement of his Mother, did present the said Crew, who was instituted and inducted, by Reason whereof, and Vertue of the said Statute, the said Presentation was void; and so it belonged to the King to present.

The Defendant pleads in Abatement, That he claims nothing in the Benefice, but upon the Presentation of Isaac Welham, who is not made a Defendant; and upon Demurrer it was argued for the Plaintiff, That where the Right of the Plaintiff was not to be devested by the Judgment, there he need not be named in the Writ.

Now here was no Complaint made againſt the Patron, but againſt the Simoniſt, he was the Diſturber; and it ſeems unreaſonable that the Plaintiff ſhould be compelled to bring an Action againſt a Perſon whom he hath no manner of Cauſe to ſue. And this is the very Difference taken by the Court in Hall's Caſe.

7 Rep. 26. a. 47 Ed. 3. 10. 11.

4 Ed. 4 pl. 7. Which ſeems to be warranted by the Year-Book of *Ed.* 4. where a *Quare impedit* was brought againſt *Richard Lorkin* as a Patron, and *John Grimſton* the Incumbent, who ſhewed that he was preſented to the Church by one *Ralph Monk*, and inſtituted and inducted thereon, and ſo pleaded in Abatement, that *Monk* was not named in the Writ.

Sir *Thomas Brian*, who was then Chief Juſtice of the Common Pleas, and who gave the Rule, held the Declaration to be good; becauſe the Plaintiff had named the Diſturber, *viz.* *Richard Lorkin*, and the Incumbent; but had no Cauſe to complain againſt *Monk*, and therefore the Plaintiff ſhall not be compelled by this Plea, to bring his Writ againſt a Perſon where he had no Cauſe ſo to do.

The Serjeant obſerves, That in the principal Caſe it was averred, That *Thorndon* was a Benefice with Cure of Souls, and then to ſhew his Learning, he makes a *Quære*, Whether it was neceſſary to make ſuch an Averment? And by a Caſe cited out of my Lord *Anderſon*, it ſeems to be neceſſary, which was: *ſſ.* The Queen brought a *Quare impedit* grounded upon the Statute of the 13 of *Eliz.* by which it is enacted, That no Perſon ſhall be admitted to a Benefice *with Cure*, except he ſubſcribes the Articles, *&c.* And the Plaintiff did not aver that the Church to which the Defendant was preſented, was a Benefice *with Cure*, according to the Words of that Statute; and upon Demurrer it was held ill for that very Reaſon.

1 *And.* 61.

13 *Eliz.* *cap.* 12.

Then he obſerves, That there is ſome Variance between that Statute of the 13 *Eliz.* and this of the 31 *Eliz.* for in the firſt it is ſaid, No Perſon ſhall be admitted to a Benefice *with Cure*, *&c.* and goes no farther; but this Statute of the 31 *Eliz.* doth not ſtop at theſe Words, *viz.* *Benefice with Cure of Souls*; but there are others added, *viz.*, *Dignity*, *Prebend or Living Eccleſiaſtical*: Then he makes another *Quære*, Whether this Difference in penning the Statutes, doth not likewiſe make a Difference in the Caſes?

But I think theſe are trifling and unneceſſary *Queries*; for if a Plaintiff will have the Benefit of any Statute, he muſt bring his Caſe to be within the Letter, or the Reaſon of it; ſo that the different Penning of Statutes muſt neceſſarily make different Caſes.

Co. Ent. 516. *Winch* 827. *Brownl.* 2. *Pl.* 217, 221. *Brownl. Lat.* *Red.* 409. 410. *Cliffe's* *Ent.* 607, 608, 609, 610.

Now I cannot ſee any manner of Occaſion why the Serjeant ſhould put a *Quære* in the principal Caſe, Whether 'tis not neceſſary that the Plaintiff ſhould aver, that *Thorndon* was a Benefice with *Cure of Souls?* for in the firſt Place it is expreſly ſo averred; beſides, he tells us, That all the Precedents are ſo in his Books of Entries, eſpecially in Caſes of Simony; all which I have examined, and find that they are ſo.

Dominus Rex verſus Epiſcop. Ciceſtr. & al'.

Paſ. 31 Jac. II. Rot. 424.

Suſſex, ff. QUARE impedit againſt the Biſhop of Chicheſter, Thomas Bickley and Michael Hicks, Clerk, to preſent to the Church of Weſt Thorndon, ſetting forth, That the ſame is a Benefice with Cure of Souls; That in the Year 1681, the Church became void by the Death of George Goater, and thereupon George Berkley was to preſent; that during the Avoidance, there was a Simoniacal Agreement made between Michael Rawlins, on the Behalf of his Brother William Rawlins, and one Thomas Bruerton, that Michael ſhould pay to the ſaid Bruerton, 220 l. who ſhould thereupon procure the Patron to preſent the ſaid William Rawlins; that Bruerton received the Money, and that Rawlins was preſented, &c.

The Biſhop pleads the Common Plea, viz. That he had nothing but as Ordinary.

Thomas Bickley demurs to the Declaration, and the Incumbent pleads, That he is Parſon imparſonee upon the Preſentation of Thomas Bickley; and that one Henry Berkley, Charles Berkley and the ſaid Thomas Bickley, were to preſent by Turns; That Henry had preſented the ſaid Goater in his firſt Turn, that Charles had preſented William Rawlins in his ſecond Turn; and that upon the Death of Rawlins, the ſaid Thomas Bickley had preſented the Defendant in his third Turn.

Then he traverſed the ſaid ſimoniacal Contract.

The Plaintiff replies and prays Judgment againſt the Biſhop, and joins Iſſue with the Incumbent upon the Simony, and likewiſe joins in Demurrer with Thomas Bickley the Patron.

The Exception to the Declaration was, firſt, The Statute of Simony is not recited according to the Precedents in the printed Books of Entries, and as it is in the very laſt Caſe before this; but this Exception was diſallowed. 21 Eliz. cap. 6. Coke's Ent. 516. 3 Winch 821. Brown. 2 Part. 216, 220. Browl. Lat. Red. 409.

2. It was objected, That the Agreement mentioned in the Declaration, is not within the Statute; but he doth not ſay why, or give any Reaſon for it, however that Exception likewiſe was diſallowed.

The Reporter makes a *Quære*, Whether the Plaintiff ſhould not have alledged that *Bickley*, the Patron, was ſeized of the Advowſon in Groſs or Appendant? for ſo are the Precedents above-mentioned.

This muſt be a Queſtion of his own, for he tells us, no Body ſpake to it, and it is ſtarted in his Book, upon no other Occaſion, than to ſhew us how pertinently he could anſwer to it, by telling us, That 'tis ſufficient for the Queen to alledge, That ſuch a one was Patron, becauſe ſhe muſt be preſumed to be a meer Stranger to his particular Title to the Advowſon.

Hele

Hele versus Epiſc. Exon', & al'.

Cooke. Hill. 2 W. & M. Rot. 1618. vel 609.

Devonſh. ff. QUARE impedit to preſent to the Church of Southpole, wherein the Plaintiff declares, That he was ſeized in Fee of the Manor of Southpole, to which the Advowſon of the Church did belong; and that being ſo ſeized, the Church being void, he preſented John Oltramare, who was inſtituted and inducted; that upon the Death of the ſaid Oltramare, the Church became void, and that it belonged to him to preſent.

The Biſhop pleaded in Bar, That the Church is within his Diocele, and that he claimed nothing but as Ordinary; that it was a Benefice with Cure of Souls, and that it was void by the Death of Oltramare; that within ſix Months after the Avoidance, the Plaintiff preſented Francis Hodder, who at the Time of the ſaid Preſentation, was a Perſon minus ſufficiens in literatura ſeu capax to have the ſaid Church; that he examined him as by Law he might, and upon his Examination found him perſonam in literatura inſufficien', and thereupon not able or fit to have a Benefice with Cure of Souls, for which Reaſon he refuſed to admit him; and within ſix Months afterwards, gave Notice to the Plaintiff that he might preſent another, and that he did not preſent, &c. ſo that the Defendant did collate the other Defendant Hayman, who was inſtituted and inducted, &c. And the Defendant Hayman pleaded the ſame Plea mutatis mutandis.

The Plaintiff replied, That Hodder at the Time of his Preſentation, was Vicar of Ogborough in the ſaid County, and that he was homo literatus, and after Examination of his Learning, had Epiſcopal Ordination, and was licenſed to preach the Word of God by Anthony, late Biſhop of Exeter; and that he had celebrated Divine Service many Years, and that he was ſatis & ſufficienter literatus to celebrate the ſame.

There was a Rejoinder and a Surrejoinder to the ſame Effect with the Plea and Replication; and upon Demurrer,

The Serjeant tells us, That this Caſe is now publiſhed by Serjeant *Levinz*; and I ſay it is likewiſe reported in *Caſes of Parliament* 88. and in the 4 *Mod.* 134. which the Reader may peruſe to be farther informed in this Matter.

3 *Leon.* 13.

Lord *Petre* verſus Univerſity of *Cambridge* and *Woodroffe*.

Hill. 3 W. & M. Rot. 303, 309, 310.

Eſſex, ſſ. QUARE impedit to preſent to the Church of Weſt Hanningfield; ſetting forth, That the Lord Petre was ſeized of the Manor of Weſt Hanningfield, to which the Advowſon of the Church did belong; that the ſame being void, he preſented John Barnes, who was inſtituted and inducted; and ſo the Plaintiff derives a Title to himſelf, upon the Death of his Anceſtor, and that the Church being void upon the Death of Barnes, it belonged to him to preſent. 3 Leon. 332.

The Chancellor, Maſters and Scholars, confeſs the Seiſin of William Lord Petre, and Deſcents to the Plaintiff, and then plead the Statute of Recuſancy, by which it is enacted, That every Perſon not coming to Church, according to the Statute 1 Eliz. cap. 2. ſhall forfeit 20 l. per Month, and that the Offence above-mentioned ſhall be inquirable before the Juſtices of Oyer and Terminer, Aſſize Gaol Delivery and Peace, in their Circuits and Seſſions, within one Year and a Day after the Offence. 23 Eliz. c. 1.

Then they plead another Act made the 29 Eliz. whereas in Truth the Parliament began 29 October, 28 Eliz. and ſo the Act is miſ-recited, viz. That for the more ſpeedy Conviction of ſuch Offender in not coming to Church, but forbearing contrary to the Statute 23. &c. 'tis enacted, When an Indictment is found againſt ſuch Offender, Proclamation ſhall be made, That he ſhall render himſelf to the Sheriff before the next Aſſize or Gaol Delivery, &c. which if he do not, that Neglect ſhall be a ſufficient Conviction, as if upon the ſame Indictment there had been a Trial and Verdict. 29 Eliz. c. 6.

Then they ſet forth the Statute 3 Jac. that a Popiſh Recuſant convict, ſhall be diſabled to preſent to a Benefice; but inſtead of him, the Chancellor and Scholars of the Univerſity of Oxford and Cambridge, ſhall preſent within the reſpective Counties, appointed to each of the ſaid Univerſities by that Act. 3 Jac. c. 5.

Then they plead, That an Indictment was found againſt the Plaintiff at the Aſſizes in Eſſex, for not coming to Church for three Months; that Proclamation was made as the Statute directs, but that he did not appear at the next Seſſions, as the Statute directs, and that his Default was recorded; that the Plaintiff being a popiſh Recuſant convict, the Church became void by the Death of Barnes, per quod the Defendants preſented Woodroffe, who pleaded in Abatement the ſame Statute and Clauſe as in the Statute 3 Jac. viz. That all Popiſh Recuſants convict, ſhall be reputed as Perſons excommunicate; then ſets forth the Indictment and Proclamation

as before, &c. but did not conclude his Plea with the Record of Conviction, hic in curia prolat'.

The Plaintiff replied to the Plea of the University, the General Pardon of King James II. and amongst the Offences therein mentioned, the Conviction, Forfeitures and Penalties in not coming to Church, are pardoned; and demurred to the Plea of Woodroffe; and upon a Joinder in Demurrer, his Plea was held ill; for that the Statute of 29 Eliz. is, That he shall tender himself to the Sheriff *before* the next Assizes, and the Plea was, That he did not appear *at* the next Assizes.

Thereupon he answered over; and now in his Plea in chief, he omitted all the former Statutes, and pleaded only 3 Jac. cap. 5. which gives Power to the Justices of Assize, and of the Peace, to proceed against Recusants by Indictment, &c. and which gives the Presentation to the University, &c.

The Plaintiff replied, the Pardon before enrolled in Chancery, &c.

The Pleadings in this Case are very long, but the Report upon it is no more, than that the Statute 29 *Eliz.* was misrecited, for the Parliament began the 29th *Octob.* in the 28th Year of her Reign: Then the Defendant *Woodroffe* did not shew any Record of Conviction, by the Words *hic in curia prolat'*. And this was held good Cause of Demurrer.

Then as to his omitting the Recital of the Statute of Queen Eliz. it was held well enough; for the Statute of King James is sufficient to maintain his Plea.

Folliffe versus Episc. Wigorn. & al'.

Winford. Pas. 9 W. III.

Worcester, ss. QUARE impedit against the Bishop of Worcester, Thomas Jervois and Walter Hinckley, to present to the Church of Norfield; setting forth, That John Webley, late Prior of the Priory of St. James the Apostle, of Dudley in Worcestershire, was seized in Fee of the Advowson, &c. who granted the next Presentation to Ralph Bradley and Richard Cassell; and then sets forth the Statute 27 H. 8. whereby the lesser Monasteries under 200 l. per Annum, were dissolved, and the Revenues given to the King; by Vertue whereof he was seized, &c. That Bradley survived Cassell, that King H. 8. died, that the said Advowson descended to Ed. 6. and so derives a Title to King Philip and Queen Mary; who by Letters Patents granted the same to my Lord Dudley, and the Heirs Males of his Body, &c.

That Ralph Bradley granted the next Presentation to Richard and Edward Levaston, &c. who presented one Henry Squire, upon the

firſt Avoidance; that the Church being void upon the Death of Squire, Queen Elizabeth preſented one White by Lapſe; that the Lord Dudley levied a Fine of the Premiſſes to the Uſe of one Hamnet and his Heirs, during the Life of the Cognizor; that Hamnet granted his Eſtate to Nicholas Paſton; that the Lord Dudley died and left Iſſue Edward his Son and Heir; that Queen Elizabeth died, and the Reverſion deſcended to King James, who granted the ſame to Sir Charles Mountague and Edward Sawyer in Fee, and they granted the Reverſion to Edward Skinner in Fee; that Skinner died, and the Reverſion came to Richard his Son and Heir, who died, and the ſame deſcended to his four Daughters, who were Coparceners, one whereof married the Plaintiff Jolliffe; that the Church being void by the Death of White, they could not agree upon a joint Preſentation, and therefore it belonged to Elizabeth, the eldeſt Daughter, to preſent; that one Timothy White was preſented by Uſurpation, who died; thereupon the ſecond Daughter ſhould have preſented, and that Jervois by Uſurpation preſented Hinckley.

This likewiſe was a very long Declaration, and no further Proceeding in it.

Crane verſus *Epiſc. Norwic. Reeve* and *Dudbourdien.*

Foley. Paſ. 2 Annæ. Rot. 1405.

Suffolk, ſſ. QUARE impedit to preſent to the Church of Owlton, in which the Plaintiff declares, That Sir Edward Reeve was ſeized of the Manor of Owlton in Fee, to which the Advowſon was appendant, &c. that he deviſed the ſame to Mary his Wife for Life, Remainder to Chriſtopher Reeve and his Heirs.

That the Church being void upon the Death of Cory, the ſaid Mary preſented the aforeſaid Chriſtopher Reeve; that both Mary and Chriſtopher died; that the Manor deſcended to Chriſtopher his Son; that the Biſhop collated him by Lapſe, and that afterwards by Leaſe and Releaſe he conveyed the Manor, &c. to Mollet and his Heirs, who conveyed it to the Plaintiff Crane; that the Church being void by the Death of Chriſtopher, it belonged to him to preſent.

The Incumbent pleads, That he is Parſon imparſonee upon the Preſentation of Mollet, and confeſſes the Deviſe to Chriſtopher the Father, and the Deſcent to Chriſtopher the Son; and the Conveyance to Mollet; but ſaith that before Mollet conveyed the Premiſſes to Crane, *&c.* Chriſtopher, the Incumbent, died, ſo that the Church was void, and Mollet preſented him; and traverſed the Avoidance at any Time after the Conveyance made to the Plaintiff.

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The Plaintiff replies, That the Church was void during the Time he was seized, &c. and the Defendant Christopher, by Usurpation, did present Dudbourdieu, and traversed that he was presented by Mollet: There was a Demurrer and a Joinder in Demurrer.

It was objected for the Defendant, that the Traverse in the Replication was ill, because it was to the Inducement of the other Traverse in the Bar; which Inducement was: If That the Church was void, and that Mollet had presented the Defendant: And now the Plaintiff traversed that the Defendant was presented by Mollet, which he should not have done; but in the Replication he should have maintained that Title which he had alledged in his Declaration, that the Church became void by the Death of Christopher Reeve, after Mollet had conveyed the Manor to him, viz. That he was seized in Fee, and that being so seized the Church became void prout he alledged in the Declaration; and so to have concluded to the Country; for the Law will not allow a Traverse upon a Traverse, as in this Case; but where the Traverse in the Bar destroys the Action, either as to Place or Time; in such Case the Plaintiff may maintain his Action as to either, and then he may traverse the Inducement to the Traverse; but where after an Inducement the Plea is concluded with a Traverse of that very Title, which was alledged by the Plaintiff in his Declaration, as it was in this Case; there the Plaintiff must maintain his Title, and shall never traverse that Inducement.

Cro. Car. 104.

But on the other Side it was argued for the Plaintiff, That the Incumbent, tho' he is the immediate Possessor, yet he may as well defend his own Right, as counterplead the Title of his Adversary; but then it must not be where he was presented by one, and where he maintains his Title under another, as the Plaintiff in this Case had done; for 'tis alledged in the Bar, that the Defendant was presented by Mollet; and the Plaintiff in his Replication alledges, that the Defendant was presented by Christopher Reeve, and traverses that he was presented by Mollet; all which the Defendant had confessed by demurring to the Replication, and therefore he is now estopped to plead any Thing as to the Title of Mollet, because it appears he was not the true Patron.

But admitting the Defendant might plead to the Title of Mollet, yet it is not well pleaded here, because he ought to have relied on the Matter, which induced the Traverse in the Bar, and should not have traversed the Avoidance at any Time after the Conveyance of the Manor made to the Plaintiff Crane; for he should have pleaded, that on such a Day Mollet was seized in Fee, and did present him; and this had been a good Confession and Avoidance of the Plaintiff's Title, which was, that the Manor, &c. was conveyed to Mollet, who conveyed it to the Plaintiff Crane, and that the Church being void by the Death of the Incumbent, it belonged to Crane to present.

25 Ed. 3. cap. 7.

If this had been pleaded, then the Plaintiff Crane should have replied, That the Church became void by the Death of the Incumbent Reeve,

Reeve, after Mollet had conveyed the Manor to the said Crane, and should have traversed that it became void before that Time; and this would have brought the Right to have been tried; for 'tis a certain Rule in the Law, that when several Titles are in Question, the eldest ought to be traversed; and if so, the Defendant should have traversed the very Commencement of the Plaintiff's Title.

But let that be as it will, yet the Traverse in the Replication must be good, because the Traverse in the Bar was immaterial, and ought not to be taken; if so, the Plaintiff hath done well to traverse the Inducement to such an immaterial Traverse.

Now supposing the Fact to be true, as alledged in the Replication, viz. That the Plaintiff Crane was seized of the Manor, &c. and that whilst he was so seized, Reeve did present the Defendant by Usurpation; How could this Matter be put in Issue, unless the Plaintiff had alledged that the Defendant was presented by Usurpation, and traversed, That he was presented by Mollet? For if he had taken Issue upon the Defendant's Traverse of the Avoidance, &c. at any Time after the Conveyance made to Crane, then the Presentation made by Reeve by Usurpation, could not have been in Question.

So that it is plain the Defendant had sheltered himself under the Title of Mollet, by whom he was not presented; for the Plaintiff had expressly alledged, That he was presented by Reeve, and this was confessed by the Demurrer; and thus his being presented by the aforesaid Reeve by Usurpation, was wholly concealed, which ought not to be, because the Incumbent is enabled by the Statute 25 Ed. 3. to defend his own Right under his Patron, and if he had no Right, then it is impossible for him to defend it: There was no Judgment given, but the Court inclined for the Defendant.

The Serjeant tells us, he had all this from the Report of those Serjeants who argued on each Side; it is in many Places very intricately reported, which I have made as intelligible as I can; and after all, it is no more than a little Nicety in Pleading, which is neither diverting or instructive to the Reader.

Replevin.

Kirby versus *Green.*

Mich. 15 & 16 Eliz. Rot. 2134.

Glouceſter, ſſ. REPLEVIN for taking his Cattle in Byrdwood; one of the Defendants pleads non cepit, and thereupon they were at Iſſue; the other made Cognizance as Bailiff to the Dean and Chapter of Glouceſter, who were ſeized of the ſaid Byrdwood in Churcham, and ſo juſtifies the taking Damage-feaſant.

The Plaintiff pleads in Bar, and confeſſes the Seiſin of the Dean and Chapter, and that they deviſed the Premiſes to John Veel for 99 Years, after the Determination of a Leaſe in being, made to Sir William Herbert; that Veel entered and aſſigned his Intereſt to the Plaintiff, that Sir William Herbert's Leaſe expired, and that the Plaintiff entered on the ſaid Manor of Churcham, and was poſſeſſed thereof, ſimul cum the Lands called Byrdwood, &c.

The Plaintiff replied, and confeſſed the Seiſin of the Dean and Chapter and the Deviſe to Veel, rendring 31 l. 10 s. 4 d. for the Manor and Lands in the Occupation of Sir William Herbert; and after the Determination of that Leaſe, then rendring 9 l. 12 s. more at the four moſt uſual Feaſts, with a Clauſe of Re-entry, if the ſaid 41 l. 2 s. 4 d. ſhould be behind for a Month after the ſame ought to be paid as aforeſaid, being lawfully demanded; then he confeſſeth the Aſſignment by Veel to the Plaintiff, and Letter of Attorney made by the Dean and Chapter to Ward and Hinton, to demand the Rent; then he ſets forth, that the 2 l. 8 s. being Part of the 9 l. 12 s. was due for a Quarter of a Year at Chriſtmas, and not paid within one Month afterwards; that the ſaid Rent was demanded the 22d of January, in a High-way in the Wood, and the Plaintiff for Non-payment diſtrained the Cattel.

The Defendant rejoins, That he on the ſaid 22d Day of January came to the Wood, a Quarter of an Hour before Sun-ſet, and ſtaid till the Sun was down, and was there ready to pay the Rent, and traverſed the Demand.

The

The Plaintiff ſur-reſoins, That his Attorney did on the ſaid 22d of January come ad apertum locum in the Wood, &c. which is a common Way, &c. half an Hour before Sun-ſet, and ſtaid there till the Sun was down, petendo the Rent, &c. et de hoc ponit ſe ſuper Patriam; and had a Verdict.

The Serjeant tells us, That he wrote a ſhort Abſtract of this Record out of Juſtice Warburton's Manuſcript, under which was this Obſervation of the Judge's Hand-writing.

Nota, This Matter of joining Iſſue was moved ſo often, that the Court was quite tired; and for that Reaſon my Lord Dyer took the Paper Book, and made the Iſſue to be upon the Demandant ut ſupra, which he wrote with his own Hand, and Harper and Mounſon ſubſcribed their Names, quod rarum; and yet it was upon the Account of this Rarity that the Serjeant enquired the Record at large, according to the Roll.

I ſuppoſe he means that he printed the Record at large; for it is eight Pages.

Now whatever he means by my Lord *Dyer*'s making the Iſſue to be upon the Demandant, and that for this Rarity he *inquired* the Record, is not intelligible to me; but that which I can collect out of the Books to make this Matter underſtood is,

The Rent in the principal Caſe being not made payable at any Place certain, the Plaintiff alledged the Demand to be in a High-way in the Wood on a certain Day.

The Defendant ſaid, That he came to the Wood on the Day, and was there ready to pay it.

Now there was a great Debate amongſt the Serjeants at Bar, whether the Traverſe ſhould be on the *Demand* of the Plaintiff, or on the *Readineſs of the Defendant to pay the Money?* And at laſt my Lord *Dyer* tells us, the Iſſue was joined upon the Demand in the High-way in the Wood. *Dyer* 329.

The Condition of the Re-entry was upon the Non-payment of the Rent within a Month after every Quarter, and the Demand was 28 Days after the Quarter, and ſo not a full Month; but this was held well enough, it being a Condition of Re-entry for Payment of Rent, tho' it is otherwiſe in many Caſes, as in the ſt. Months to collate it ſhall be accounted Kalendar Months. 2 Cro. 166.

In the Caſe of *Fabian* and *Rawſtone* there was the like Iſſue; but there the Rent was made payable at *Michaelmas* and *Lady-Day*; and the Condition of the Re-entry was, If the Rent was not paid twenty-one Days afterwards, being lawfully demanded at a Place certain. 1 *And.* 252.

The Rent being Arrear, the Plaintiff came on the laſt of the *twenty-one Days*, Half an Hour before Sun-ſet, and ſtaid there till it was down, demanding the Rent, *&c.*

The Defendant pleaded, That he was ready at the Time and Place to pay the Rent, *abſq; hoc* that the Plaintiff came there Half an Hour before Sun-ſet, and upon this they were at Iſſue; and the Jury found that he came there a Quarter of an Hour, and not Half an Hour

before

before Sun-ſet, and that he demanded Half a Year's Rent then due, whereas it was due on *Lady-Day* before: Now the Court held, That the Traverſe was taken upon an immaterial Point; for if there was Time enough before Sun-ſet to pay the Money, 'tis ſufficient; but they held the Verdict did not anſwer the Iſſue, becauſe it did not find the Demand of the Rent due at *Lady-Day*, but of Half a Year's Rent due at the Time the Demand was made, *viz. twenty-one Days* after.

Campion verſus *Baker*.

Cooke. Hill. 36 & 37 Car. II. Rot. 331.

Huntingdon, ſſ. REPLEVIN for taking his Sheep in Sewers Leys; the Defendants make Cogniſance as Bailiffs of William Barker, whoſe Freehold it was.

The Plaintiff replies, That he was ſeized in Fee of a Meſſuage in Bury, &c. and preſcribes to have Right of Common in Sewers Leys for his Sheep, after Harveſt till Candlemas; and in the Year when the ſame, or any Part thereof was not ſown, then from Lammas Day to Candlemas; that three Acres lay fallow, &c. and that the Plaintiff put in his Sheep and Lambs utendo communiam in Sewers Leys.

The Defendants maintain their Bar, and traverſe that the Plaintiff was ſeized in Fee of the Meſſuage, &c.

The Plaintiff rejoins, That he was ſeized in Fee, &c. and thereupon they were at Iſſue, and the Venire facias was returnable Octab. Pur'; which is the laſt Return in Hillary Term.

Then comes the Defendant in propria Perſona ſua, at the Niſi prius, and pleads, That after the laſt Continuance, viz. after the 12th Day of February, (which is the laſt Day of the Term) and before the 8th Day of March, de quo quidem 12° Februarii the Proceſs was continued uſq; ad hunc diem, the Plaintiff did releaſe the ſaid Action, & hoc parat' eſt verificare.

Cro. Eliz. 49. Co. Ent. 517, b. Aſton 8. 417. Cliff 620. Yelv. 141.

The Plaintiff appears and demurs to the Plea, which was adjudged not good, becauſe there was no Place where the Releaſe was executed; beſides, it was a very informal Plea of a Releaſe, for it ought to have been pleaded in Bar, viz. Quod quer' Actionem ſuam prædict' ulterius manutenere non debet, quia dicit quod poſt ultimam continuationem placiti præd', viz. poſt Octab. Pur' laſt paſt; from which Day the Action was continued to this Day, viz. * in quinden, Paſ. then next following; and before that Day, viz. 8° Martii, the Plaintiff mentioned in the Record per Nomen, &c. did releaſe, and he ought to conclude his Plea in Bar, viz. Petit Judicium ſi, (the Plaintiff) actionem ſuam præd', inde verſus eum habere ſeu manutenere debeat; and not conclude it as he did, viz. Si ad caption' jurat' procedere debeant.

* This is omitted in the Plea.

This was to the Form, but then to the Matter of the Plea, it seems that a Releaſe after the laſt Continuance is a good Plea in Bar, if it had been well pleaded.

And this is inferred from a Caſe in my Lord *Rolle*'s 2 *Abr.* which was in *Replevin*: *A.* the Defendant made Cognizance in the Right of *C.* and had Judgment to have a Return, and Coſts and Damages; and upon a *Scire facias* brought againſt *A.* to have Execution, he pleads a Releaſe from *C.* in whoſe Right the Cognizance was made; and this was held no Plea, becauſe *C.* was not a Party to the Suit; from hence it was inferred by the Serjeant, that if he had been a Party to the original Suit, that his Releaſe had been a good Bar. 2 *Rol. Abr.* 412.

Savery verſus *Smith.*

Belvin. Mich. 2 Jac. II. Rot. 373.

Wiltſhire, ſſ. REPLEVIN for taking her Cattle in the High-way Street; the Defendants made Cogniſance as Servants to John Blomer, ſetting forth, That he was ſeized in Fee of an ancient Market held every Wedneſday in Highworth; then they preſcribe to take a Half-penny for Toll for every Hog ſold in the Market; and if the Buyer refuſed to pay it, then to diſtrain for the ſame; that the Plaintiff bought two Hogs in the Market; that the Toll was demanded, and ſhe refuſed to pay it; and ſo they juſtified the taking the Diſtreſs for the ſaid Toll.

The Plaintiff replied, That ſhe is Tenant of the Manor of Hanningdon, in the ſaid County, which is ancient Demeſne, and that the Tenants of ancient Demeſne are quit of Toll in all Places in this Kingdom; and upon Demurrer,

It was objected to this Replication, that the Plaintiff had not well intitled her ſelf to this Privilege, for ſhe ſays ſhe is Tenant of the Manor, and therefore ſhe may be intended to be Lady of the Manor.

She ought to have alledged, that ſhe was ſeized in Fee of ſuch Lands, &c. which ſhe held of ſuch a Perſon, as of his Manor of H. which is ancient Demeſne; and ſo is Thompſon, Lib' plac' 303.

What I ſhall obſerve from theſe Paragraphs is, That it ſeems a very illogical Conſequence, that becauſe the Plaintiff hath alledged that ſhe is *Tenant*, therefore ſhe may be intended to be *Lady of the Manor*.

Then as to the Precedent in *Thompſon*, there is no Allegation of any Seiſin in Fee, or that the Plaintiff held of ſuch a Man as of his Manor of *A.* It was a Replication, as this is, wherein the Plaintiff ſaid, that the Village of *A.* was ancient Demeſne, and the Plaintiff dwelt there, and held Lands in the ſaid Village in ancient Demeſne, but did not ſay of whom, and that all ſuch Tenants and Inhabitants are Toll-free, *&c.*

'Tis true, the Book tells us, that this Exception was disallowed; for in many Cases, as well as this, where Prescriptions are alledged in Tenants and Inhabitants of Manors, they shall not be intended to be Lords of Manors; but if they should be so intended, it is expressly said in F. N. B. 228. b. that the Lords themselves shall be quit of Toll as well as the Tenants.

260. *b.* And *Fitzherbert* gives this Reason for it, because in the Register there is the Form of an Attachment brought by the Duke of *Gloucester*, who was Lord of the Manor of *S.* against the Bailiffs of *O.* suggesting, that *he & homines & Tenentes sui* of that Manor ought to be quit of Toll, and that by a former Writ the Bailiffs were commanded to suffer *the Duke* and his Tenants to be free; which Writ they did not obey.

F. N. B. 228. b. Litera D. Cro. Eliz. 227. Then as to the Objection, That the Plaintiff should have alledged that she was seized in Fee, &c. there is no Necessity of it, because a Tenant for Life, or Years, or Tenant at Will, who held in ancient Demesne, shall be quit of Toll; and therefore 'tis not usual to express what Estates such Tenants have; but 'tis sufficient to say, quod homines & Tenentes de antiquo Dominico, &c. ought to be discharged of Toll; and so are the Writs in the Register, and F. N. B.

Reg. 260. B. F.N.B.228.a.

2 Institutes 221, and not 222. It was objected that the Privilege was laid too general, for 'tis to be quit of Toll in all Places; but Tenants of ancient Demesne are not discharged of all Things, but only of such which arise upon their Tenements, and which are for the Ease of their Families, and not for Merchandize; and the Reason is, because in the Beginning they applied themselves to manure the King's Demesnes, which by their Tenure they were obliged to do; therefore for their Encouragement to undergo that Labour, they had the Privilege to be Toll-free, for all Things which did arise or grow on the said Lands; but when once they turned Merchants, they were out of the Reason of this Privilege.

In the Paragraph above-mention'd, the Serjeant makes no Manner of Distinction between *Places and Things*; for thus he argues: *ff.* The Privilege of a Tenant in ancient Demesne to bequtof Toll in *all Places* is too general, because he is not discharged of Toll of *all Things*, but only of such which arise on his Land.

Now I must appeal to the Reader whether this is not an admirable Way of Reasoning? For I would fain know whether such a Tenant is not discharged of *such Things* in all *Places* where he is a Tenant?

But to proceed, he tells us, this Objection was disallowed, because this Pleading agreed with the former in the Register, and with * Knight and Ward's Case, which was an Action for taking a Cable for Toll; in which the Plaintiff declares, That Lostock is a Village and ancient Demesne, and that the Tenants of ancient Demesne are to be quit of Toll in all Places; that he was an Inhabitant and Tenant there, &c.

* Cro. Eliz.

The

The Defendant justified the taking by Vertue of a Custom for taking Coll for any Goods brought by Sea to merchandize, and that the Plaintiff brought by Sea twenty hundred Weight of Cable to merchandize: This was held a good Plea, because it appeared the Cables were brought thither to merchandize.

Now if the Hogs in the principal Case were bought to merchandize, that ought to be shewed on the other Side, otherwise it shall be intended that he was about his lawful Business, according to the Duty of his Tenure in Socage, which is to plow the Lands of his Lord, and not to buy Hogs for Merchandize.

'Tis true, A Tenant in Socage is by his Tenure to plow his Lord's Lands, but I cannot imagine how the Serjeant could bring that in, where the subject Matter was about buying of Hogs, and I must so far disagree with him, that I should rather think the Plaintiff bought the Hogs to merchandize, than to plow the Land.

The Serjeant concludes this Case with two Nota's; one was, That the Plaintiff had not alledged a Prescription for this Privilege. Nor that he had given Notice before he did take the Distress that he was a Tenant in ancient Demesne, for so is the Precedent in Thompson.

But he answers, That he need not alledge a Prescription to this Privilege, because it is given to such Tenants by the Law of the Land.

Then as to Notice, &c. this might have been a colourable Objection, if the Manor of which the Plaintiff held, and the Place where the Distress was taken had been in different Counties; but it appears by the Record that both were in the same County; and therefore after the Plaintiff had set forth his Case in his Declaration, 'tis sufficient for him to say, that the Defendant Præmissor. non ignarus, &c. and so is Ward and Knight's Case in Cro. Eliz.

If a Man retain my Servant in the same County where I dwell, an Action will lie upon the Statute of Labourers, without giving Notice of the first Retainer; but if the last Retainer was in another County, the first Master must give Notice that he was hired by him; and this Difference seems to be warranted by the Year-Book, 17 Ed. 4. 7. 18 Ed. 4. 5. which was thus:

ff. An Action was brought upon the Statute of Labourers; wherein the Plaintiff set forth, That he had retained a Servant in *London*, and that the Defendans had likewise retained the same Person *there* before the End of the Term.

The Defendant pleaded in Bar, That he found the Servant wandering in *another County*, out of Service, *&c.* and thereupon he hired him for a Year, and traversed that he retained him in *London*; and this was held a good Plea, without *Notice* given to the last Master, of the first Retainer.

Petre

Petre versus *Duke*.

Winford. Mich. 2 Jac. II. Rot. 325.

Midd. ſſ. IN Replevin the Writ was in the detinet for taking his Goods in the Pariſh of St. Martin's in the Fields, in a Place called Maiden-lane, ad valentiam 20 l. & ea injuſte detinuit, &c.

The Defendant in his Avowry ſets forth, That the Place where, &c. contained a Meſſuage with the Appurtenances in the Pariſh of Covent-Garden, and that one Humphrey Michel was ſeized thereof in Fee, who deviſed it to the Defendant for 21 Years, who let it to one Peddy for a Year, under the Rent of 28 l. payable quarterly; and ſo avowed the taking for a Quarter's Rent.

21 Ed. 4. 64. 9 H. 6. 39. And upon Demurrer, this Avowry held ill, becauſe it did not anſwer the taking in the Declaration, for he ſhould have traverſed the Place where the Plaintiff alledged the taking to be.

But then an Exception was taken, viz. That there was a Variance between the Writ and the Count; for the one is in the detinet, and the other in the detinuit.

But the Parties agreed to mend on both Sides, and ſo this Point was not reſolved, but certainly it was a material Objection; for in a Replevin in the detinet, the Plaintiff muſt recover the Value of the Goods and his Damages for the taking; but if it is in the detinuit, that is, in the Preterperfect Tenſe, it implies that the Plaintiff hath his Goods again; and therefore he ſhall only recover for the wrongful taking.

Co. Ent. 610, 611. F.N.B. 69. B.

Egerton verſus *Sheafe*.

Belvin. Trin. 3 Jac. II. Rot. 343. C. B.

Kent, ſſ. REPLEVIN for taking his Cattle in Houſe-field, &c. The Defendant made Cognizance as Bailiff to William King, Adminiſtrator of Joan King, for that the Place where, &c. contain 11 Acres in Meſham, of which George and Richard Coventry were ſeiſed in Fee; and by Indenture made between them of the one Part, and Thomas King and the ſaid Joan of the other Part, reciting that one William Clerk by his laſt Will, dated in September 1649, deviſed to the ſaid Joan, his eldeſt Daughter, 20 l. per Annum, payable half yearly during her Life, and after her Deceaſe, to the Heirs of her Body, for their Maintenance and Education, until they ſhould attain the ſeveral Ages of 21 Years, and deviſed

vised to the Child or Children of the said Joan, 300 l. to be equally divided between them, and made Anne Coventry Executrix; reciting also, that she proved the Will, and that George and Richard Coventry, in Performance of an Agreement made between them, and the said Thomas King and Joan his Wife, did grant a Rent-Charge of 20 l. to the said Thomas King and Joan his Wife, and to the Heirs of the said Joan, to be issuing out of the said eleven Acres, with a Clause of Distress, &c. and covenanted to pay the Children of Joan, 300 l. at their several Ages of eighteen, if Daughters, and twenty one if Sons; and if Default shall be made in Payment of the said 300 l. then they the said George and Richard Coventry did by the said Indenture, grant to the said Thomas King and Joan his Wife, and to the Heirs of the said Joan, an Annuity of four Pound, over and above the said Annuity of 20 l. as a Forfeiture or Penalty to be issuing out of the Premisses, with a Clause of Distress for the said 4 l.

That Thomas and Joan King had Issue William King, their eldest Son, and Richard and Thomas, and no other Children.

That William King was of full Age in April, 1670. so that 100 l. was due to him, which not being paid, the said Annuity of 4 l. per Annum became due to him.

That his Father died in April, 1680. and his Mother also died intestate; and Administration was granted to the said William King, and because 40 l. of the said Annuity of 4 l. per Annum, was due before the Death of his Father for ten Years, the Defendants as Bailiffs of the said William King, made Cognizance, &c. and upon Demurrer,

The Question was, Whether the four Pound per Annum was a distinct Rent, or a nomine pœnæ annexed to the 20 l. per Annum, for if 'tis a nomine pœnæ, then the Plaintiff could not distrain for it.

Because at Common Law, the Heirs, Executors or Administrators of a Man seized of a Rent, *&c.* had no Remedy for the Arrearages incurred in the Life-time of the Owner; but now a double Remedy is given by the Statute 32 *H.* 8. both by an Action of Debt, and by Distress; but this is in Cases of Rent-Services, Rent-Charge, Rent-Seek and Fee-Farm Rents but a *nomine pœnæ* is not within that Act; so that an Action of Debt lies in such Case, and not a Distress.

Those Judges who held this was not a nomine pœnæ, argued 1. that this annual Rent of 4 l. was not to arise upon the Default of Payment of the Rent-Charge of 20 l. but upon a collateral Matter, viz. upon Non-payment of the 100 l. Parcel of the 300 l. Now a nomine pœnæ is always created upon Default of Payment of a Rent before granted, and though 'tis said in the Indenture, that this 4 l. shall be paid as a Forfeiture or Penalty, that must be intended for a Forfeiture, for not paying the 100 l. as aforesaid.

2. Admitting it to be an independent Rent, then the Question will be, Whether the Arrearages incurred in the Life-time of Thomas King the Husband, as well as those which were due in the Life

of his Wife (she surviving her Husband) shall go to the Administrator of Joan? And they all agreed it shall go to the Administrator upon the Authority of * Temple's Case, viz. That the Arrearages due in the Life of the Husband, shall survive to the Wife.

* Cro. Eliz. 791.

But no Judgment was given in the principal Case.

Wood versus *Atkinson* & al'. *Cooke.* Pas. 4 Jac. II. Rot. 312.

York, ff. REPLEVIN for taking six Steers in Midleham Moore.

The Defendant pleads, That he was seized in Fee of thirty four Cattle-gates in Midleham Moore; and because four of the Plaintiff's Cattle were feeding there, to the Damage of the Defendant, he in his own Right, and the other Defendants as Bailiffs to him, justifie the taking, &c. and as to the other two Steers, the Defendant John Holdesworth says, That he was seized in Fee of eight Cattle-gates in Midleham Moore; and because these Steers were there doing Damage to his Pasture, he took them.

The Plaintiff, as to the Avowry for taking four Steers, demurred, and there was a Joinder in Demurrer; and as to the Avowry for the two Steers, he pleads, That the locus in quo is Parcel of the Manor of Midleham, and that he was seized of the said Manor in Fee, and that there was sufficient Pasture for the eight Beasts of the Defendant Holdesworth, and for all other Cattle of those who had Right of Common there.

The Defendant rejoins and maintained his Avowry; and farther said, That no Person but those who have Cattle-gates, had any Right to put their Cattle in there; and that the Defendant Holdesworth, and divers other Persons were seized and possessed of two hundred and seventeen Cattle-gates, and that the Plaintiff had no Right of Common there; and traversed, that there was sufficient Pasture for his eight Steers, and the Cattle of all others who had Right.

The Plaintiff demurred and had Judgment, because the Defendant did not shew any manner of Title to these Cattle-gates, either by Grant or Prescription.

The Serjeant cites 1 *Inst.* 121. to prove this Matter, but 'tis not to be understood whether he means the Text or Comment; but I think neither of them is much to this purpose: The Text is, *ff.* If a Man will prescribe to such Things that cannot be aliened without Deed or Fine, he must lay the Prescription in himself and his Ancestors, whose Heir he is, and not in him and them *whose Estate* he hath; and *Littleton* gives this Reason, *viz.* because he cannot have that Estate without Deed or Writing, which he ought to shew if he will

will have the Benefit of it; but when he preſcribes in himſelf and his Anceſtors, there he comes in by Deſcent without any Deed.

'Tis true, *Littleton* ſays, a Man may preſcribe by a *Que eſtate* to ſuch Things which depend on Lands and Tenements, and may ſay, That he and they *whoſe Eſtate* he hath, who were ſeized of the Lands, *&c.* have been ſeized of thoſe Things as Appendant to the ſaid Lands; and the Reaſon is, Becauſe ſuch Lands may paſs by Alienation without Deed.

My Lord *Coke* in his *Comment* tells us, That a Man cannot preſcribe by a *que eſtate*, to any Thing that lieth in Grant, and which cannot paſs without Deed or Fine; but if the Plaintiff will preſcribe for ſuch Things, it muſt be in himſelf and his Anceſtors, becauſe in ſuch Caſe he comes in by Deſcent, without any Grant; but when it lieth in Grant, 'tis but a Conveyance to that which is claimed by the Preſcription; and there a *que Eſtate* may be alledged of ſuch Things. As for Inſtance, a Hundred lieth in Grant, and a Leet is derived out of it; now if a Man claims a Title to the Leet, he may preſcribe that he and his Anceſtors, and all thoſe *whoſe Eſtate* he hath in the *Hundred*, have Time out of Mind had a Leet, *&c.*

Then he proceeds and tells us, That a Plaintiff cannot intitle himſelf by a *que Eſtate*, but he muſt ſhew how, unleſs it be in the Caſe of an Avowry, for there though he is the Actor, yet he is become a Defendant.

The Caſe in 2 *Leon.* is a little more to the Purpoſe; it was in Replevin, the Defendant avowed for that he was *ſeized of a Hundred*, and that he and all thoſe *whoſe Eſtate* he hath in the ſaid Hundred, had uſed to hold a *Leet* there; and that at every Leet, the Inhabitants uſed to pay 16 *l.* ſt. *Certa Leta*; and that they have uſed to diſtrain for the ſame: It was objected, That the Defendant in making a Title to the Leet by Preſcription, conveys the Hundred to himſelf by a *que Eſtate*, without ſhewing a Deed of it; now this might have been a good Exception, if the Hundred it ſelf had been in Queſtion; but where a Thing is claimed by Reaſon of an Hundred, there 'tis ſufficient to ſay, That he was *ſeized* of the Hundred, without ſhewing any Title. 2 *Leon* 74. 3 *Leon* 78. idem.

There was another Objection in the principal Caſe, viz. That the Plaintiff in Bar to the Avowry, had alledged that he was ſeized in Fee of the Manor of Midleham, of which the Place where, &c. was Parcel, which might very well be, and yet the Plaintiff have no Title to the Soil, for that might be the Land of ſome Freeholder of the Manor; but this Exception was over-ruled, becauſe it is the Demeſnes alone, and not any other Lands, that is Parcel of the Manor; and ſo the Plaintiff had Judgment.

Fowkes

Fowkes versus *Joice* & al'.

Tempest. Trin. 4 Jac. II. Rot. 1880.

Hertford, ſſ. REPLEVIN for taking his Cattle in a Place called the Fields, one of the Defendants avowed in his own Right, and the other made Cognizance, &c. for that the Place where is called the Watch-houſe Field, and that the Defendant Joice was poſſeſſed of the George-Inn in Barnet, and of eight Cloſes of Paſture, of which the Place where was Parcel, for and during the Term of eight Years; and being ſo poſſeſſed, he demiſed the ſame to one John Wills for ſeven Years, under a Yearly Rent, which being arrear, he diſtrained, &c.

The Plaintiff pleads in Bar, That he was poſſeſſed of the Cattle, &c. and one Arthur Grootock, and ſome other of his Servants by his Command, were travelling from a certain Hill in Leiceſterſhire, through Barnet towards London, ad proficuum averiis illis faciend', and did not ſay to Market; and that the Defendant Joice, knowing that they were the Plaintiff's Cattle, did by the Conſent of the ſaid Wills, give the Servant Leave to put the Cattle there for one Night in his Journey towards London, and that they put them in accordingly, prout eis bene licuit; and that the Defendant ſeized them.

The Defendant replied, That the Cattle were Levant and Couchant in the Place where, &c. and that he took them for Rent arrear.

The Plaintiff rejoins as in the Bar, traverſes that the Cattle were Levant and Couchant, to which the Defendant demurred.

3 *Leon.* 260. This Caſe is reported in 3 *Leon.* where the chief Queſtion was, Whether theſe Cattle coming towards *London* for Proviſion for ſo great a City, could lawfully be diſtrained for Rent of a Cloſe, in which they lay but one Night in their Journey? And it was held they might, for 'tis unreaſonable that Cattle coming from all Parts of the Kingdom, ſhould be privileged all the Way from all Landlords.

Serjeant *Levinz* tells us, That Juſtice *Lutwych*, upon the firſt Argument held, That theſe Cattle were not liable to a Diſtreſs, and that he grounded his Opinion upon *Rede* and *Burley*'s Caſe, which is variouſly reported by Juſtice *Croke*; and which I take to be thus: *Cro. Eliz.* 549, 596. *ſſ.* A Clothier put out Wool to ſpin, and afterwards came with a Horſe to the Spinner's Houſe to fetch his Yarn; the Spinner having no Beam, they both went to a Neighbour's Houſe to weigh it; and whilſt they were there, the Lord diſtrained the Horſe and Yarn for his Services; the Court held the Diſtreſs unlawful, becauſe the Trade of a Clothier is for the publick Good, and he ought to be allowed all neceſſary Means to compleat his Trade.

But this ſeems to be a weak Reaſon, for though the Trade of making Cloth is for the publick Good, yet weighing of Yarn cannot be of ſo great Importance, as to privilege it from a Diſtreſs.

The Serjeant hath made a *Quære*, **Whether the Avowry is not bad, becauſe the Defendant ſaid he was** poſſeſſed **of the Place where the Diſtreſs was made, without ſhewing how?**

And for this he bids us look into *Pell* and *Garlick*'s Caſe in his Book, where the *Quære* is reſolved: It was Treſpaſs for taking four Colts; the Defendant pleads, That he was poſſeſſed of a piece of Paſture Ground called the *Upper Market-Baulk*, and took the Cattle there Damage-Feaſant: Now it was held, That where a Man is Plaintiff, he may declare that *poſſeſſionatus eſt*, which is good againſt a Wrong-doer; but where he is Defendant, and will juſtifie by any Special Pleading, either in Treſpaſs or Replevin, he muſt ſhew a Title.

And now I will add another *Quære*, ſſ. Whether it had not been better if the Defendant had alledged and ſtood upon the Privilege of an Inn? And not to ſay that the Cattle were put into the Cloſe by the Conſent of the Landlord; for notwithſtanding ſuch Conſent, he may diſtrain them.

Hill verſus *Bolton* & al'.

Cooke. Hill. 1 W. & M. Rot. 2508.

Warwick, ſſ. REPLEVIN for taking his Goods in a Houſe in Warwick: The Defendant Bolton avows in his own Name, and the other Defendants make Cognizance as his Bailiffs, for that the Place where is a Cottage in Warwick, and that the ſame and another Cottage and Garden in Warwick, were Parcel of the Manor of Warwick, until the 31 Decemb. 7 Car. 1. and afterward, and were Copyhold, and deviſeable by Copy of Court-Roll; but doth not ſay ad voluntatem Domini; that King James I. was ſeized of the ſaid Manor in Fee, and granted the Premiſſes by Copy of Court-Roll, to one Hews for Ninety nine Years, under the Rent of 4 d. per Annum, and afterwards by Indenture under the Great Seal, granted the Manor to Sir Francis Bacon and others for Ninety nine Years, as by the Incollment of the ſaid Indenture appeareth; that the ſurviving Leſſee aſſigned his Intereſt to William Williams and others, and then a Title is derived to King Charles I. who granted the Reverſion in Fee to one Ditchfield and others; and they granted the ſame to Bolton the Grandfather, and to Norton and Laffell, and their Heirs; that Williams aſſigned his Intereſt to Bolton the Grandfather, who being ſeized, the Reverſion deſcended to Stephen his Son and Heir; and afterwards the ſaid Indenture under the Great Seal was loſt, poſteaq; obiit ſeiſit' de

reversione, but doth not say Stephanus obiit, and that the Reversion descended to the Defendant his Son and Heir, and so avows for 4 s. 8 d. Rent, of 4 d. per Annum for fourteen Years.

The Plaintiff replies, and by Protestation that the Place where is not Parcel of the Manor, &c. and pro placito saith, That bene & verum est, the King demised to Sir Francis Bacon, &c. but traversed the Grant made by King Charles I. to Ditchfield.

And upon Demurrer the Traverse was held insufficient, and so was the Avowry; 1. Because it was alledged that the Tenements were deviseable by Copy of Court-Roll, without saying ad voluntatem domini.

2. The Devise to Sir Francis Bacon, &c. was alledged to be under the Great Seal, and refers to the Enrolment, but doth not produce any Exemplification or Constat.

3 & 4 *Ed.* 6. *cap.* 4. 'Tis true, if a Man might alledge as in this Case, that the Deed is lost, the Statute of the 3 and 4 *Ed.* 6. would be to little Purpose, by which 'tis enacted, That an Exemplification of the Enrolment of Letters Patent under the Great Seal, shall be as good as if the Letters Patent were produced: Which Act was made in favour of the Subject; and the Words seem to imply, that the King's Grants should be enrolled, that the Patentee may have the Benefit of such Grant, if it should happen to be lost.

Then the Question will be, Whether this is not helped by the Confession of the Plaintiff in his Replication, viz. that bene & verum est that the King granted, &c. under the Great Seal? Two Justices were of Opinion, That 'tis not aided; but as to that the Court gave no Judgment.

But admitting that the Defendant ought to have produced an Exemplification, it may be a Question, Whether the Plaintiff can take Advantage of it upon a Motion, or whether he ought not to have demurred Specially, and shewed it for Cause?

3. 'Tis said, That Stephen being seized, &c. the Indenture was lost, and that 2 Novemb. 20 Car. he died de tali Statu suo seisit', when it should have been Stephen died de tali Statu suo, &c.

But certainly this could never be an Objection of any Weight, for the whole must be taken as an entire Sentence; and in one Part of it is alledged, That he was seized in Fee, which must be intended to continue if nothing is shewed to the contrary: Now if the Fee continued in him, it is impossible any other should die seized.

Besides, 'tis alledged, That after the Death of Stephen, the Reversion descended to the Defendant as his Son and Heir; which could not be if he had not died seized.

Hob. 51. Now though it is not expresly averred, that *Stephen* died seized, yet if by the Pleading it appears so, 'tis sufficient.

As where Lands were given to *Elizabeth*, and the Heirs of her Body, the Remainder to *John Pissing* and his Heirs; and in a *Formedon*, the Demandant counted, that the Lands after the Death of *Elizabeth* and *John*, ought to remain to her as *Daughter and Heir* of *Robert Pissing*, who was Brother and Heir of *Hugh Pissing*, who was

Son and Heir of *John*; when by the Form in the Regiſter, it ſhould be, *viz.* after the Death of *Elizabeth* and *John*, the Lands ought to remain to the Plaintiff, as Couſin and Heir of *John* the Donor.

Now though it was not alledged that ſhe was Couſin and Heir, *&c.* yet it appearing by the Pedigree that ſhe was ſo, that was held ſufficient.

So in a *Formedon in deſcender* the Demandant alledged, that the Right deſcended to him after the Death of *Leonard*, as Brother and Heir of the ſaid *Leonard*, *&c.* but did not alledge that *Leonard* died without Iſſue, yet this was held well enough; becauſe if *Leonard* had Iſſue, then the Demandant could not be Brother and Heir to him. 1 *Mod.* 219.

Theſe were all Exceptions made to the Pleading, but as to the Matter, the Caſe was:

ſſ. A Leaſe for Years is made of a Copyhold Tenement, reſerving Rent, then a Leaſe is made of the Manor it ſelf, to which the Tenement belonged; the Reverſion in Fee of which Manor expectant upon the Determination of this laſt Leaſe, was granted to Bolton the Grandfather, and two other Perſons, and afterwards they being all alive, the Leaſe for Ninety nine Years is aſſigned to Bolton alone, whoſe Grandſon avowed for the whole Rent.

Now the Queſtion is, Whether by the Aſſignment of the Term to Bolton alone, it was not merged in the Freehold, which was then in three of them, and by Conſequence the Joint-Tenancy deſtroyed? for if it was deſtroyed, then Bolton had a Title but to Part of the Rent, and having avowed for the whole, his Avowry is altogether bad.

'Tis true, if a Man avows for more than his Due, there he ſhall have a Return for what is due, and no more; but this muſt be underſtood where the quantum of the yearly Rent is agreed on both Sides in the Pleading, and they differ only in what is arrear.

But when they differ in the quantum of the Rent, and it appeareth that the Avowant hath no Title to all that he claimed, he ſhall not have a Return for any Part, but the Avowry is wholly naught.

The Serjeant ſays, This Queſtion was never yet reſolved, and therefore he puts a *Quære* on it; and that the Reader may be informed, he refers him to my Lord *Coke*'s *Comment* on *Littleton*, 182. *b.* where he ſays, If a Leaſe is made to two for their Lives, and then the Leſſor granteth the Reverſion to both, and to the Heirs of their Bodies, the Jointure is ſevered, and they are Tenants in Common.

So if a Man makes a Leaſe to two for their Lives, and afterwards granteth the Reverſion to one of them in Fee, the Jointure is ſevered; and the Reverſion is executed for one Moiety immediately in himſelf, and there is a Tenant for Life of the other Moiety, the Reverſion in Fee to the Grantee of the ſaid Reverſion.

In Littl. Sect. 302. If there are two Joint-Tenants in Fee, and one of them maketh a Leaſe of his Eſtate to a Stranger for Life, the one Joint-Tenant and the Leſſee, are Tenants in Common; for the Freehold is ſevered; and for the ſame Reaſon the Reverſion that depends upon the Freehold is ſevered.

All

All these Cases do not come up to the Question, because they all concern the Freehold; but the Case under Debate, concerns a Chattle Interest, and therefore my Lord Coke's Comment in 185. a. comes a little nearer to the Matter.

ſſ. If there are two Joint-Tenants in Fee, and one of them maketh a Leaſe for Years reſerving a Rent, and dieth; the other Joint-Tenant ſhall have the Reverſion by Survivorſhip, which ſhews that the Jointure was not ſevered by granting this Leaſe.

Now the Difference between that and the principal Caſe is only this, viz. That in the Caſe in Littleton, one Joint-Tenant had made and departed with a Chattle Intereſt, viz. a Term for Years, and in the preſent Caſe he had gained one; but there was not any Freehold acquired in either of theſe Caſes, for that was ſtill continuing and never ſeparated from the Inheritanee, of which the Parties were Joint-Tenants.

The Serjeant tells us, Judgment was given againſt the Avowant, which he conceives was for the ill Pleading, in not alledging ad voluntatem Domini, &c. and not for any other Objections made to it, for the Court gave no particular Reaſons for their Opinion.

He concludes this Caſe with a *Nota* of his own, *viz.* That the Defendant had pleaded, that he was ſeized of the Reverſion (expectant upon the Determination of the Term for Ninety nine Years) in Dominico ſuo ut de feodo, when the Precedents are ut de feodo only, without Dominico: But firſt he inſtances where 'tis pleaded *in Dominico ſuo*, and ſo are the Books in the Margent; but I find nothing in the firſt *Brownl.* 105. to this purpoſe.

2 *Rep.* 20, 27. 4 *Rep.* 68. *Dyer* 178. *Co. Ent.* 596.

In ſome Precedents 'tis otherwiſe, viz. That the Reverſioners were ſeiſed ut de feodo, but that is when the Reverſion depends upon an Eſtate for Life, and therefore it's naught if 'tis pleaded in Dominico ſuo ut de feodo, when the Reverſion depends upon a Freehold; and for that Reaſon an Avowry was held inſufficient.

Dyer 184. Dyer 257.

Rainbow verſus *Worrall* & al'.

Winford. Trin. 2 W. & M. Rot. 1731.

Warwick, ſſ. REPLEVIN againſt four, for taking a Waggon in a Place called the Street in Priors Marſton, 21 Julii, 1 W. 3.

The Defendant's confeſs the taking, &c. but pleaded in Bar that the Plaintiff releaſed two of them 6 Feb. 1. W. 3. but doth not ſay before the Writ, or pending the Writ, or after the laſt Continuance.

The Plaintiff replied, that he had declared againſt the Defendants in Michaelmas Term, 1 W. 3. modo & forma prædict', and

that they imparled till Hillary Term following, and ſo ſets forth Continuances till Eaſter and Trinity Term, and demands Judgment, if the Defendants ſhall be admitted thus to plead, after they had imparled from Eaſter to Trinity Term; and upon Demurrer, the Queſtion was, Whether the Defendants had not loſt the Advantage of this Plea, by imparling after the Leaſe was made, becauſe by the Imparlance they had affirmed the Action; for if they would take any Benefit by the Releaſe, they ſhould have pleaded that it was made after the laſt Continuance; which they could not do in this Caſe, becauſe it was made before.

This was admitted to be true, if it had been after Iſſue joined, for ſo are all the Books; and that there is no Occaſion of ſetting forth Continuances before Iſſue joined, but always after. 35 H. 6. 1. 38 H. 6. 8.

The Serjeant tells us, there are Variety of Opinions in the Year-Books concerning this Matter: As for Inſtance, 'tis ſaid, If the Defendant imparles *after*, he ſhall not plead it in Bar to the Action. *Fitz. Continuance* 14.

But after Imparlance, the Defendant may plead that the Plaintiff is his Wife, and the Reaſon given is, becauſe it is *in Bar*; for after an Imparlance, he cannot plead *in Abatement* any Diſability of the Plaintiff, becauſe by imparling he had affirmed, that the Plaintiff might bring his Action. 22 *Ed.* 4. *cap.* 36.

So after an Imparlance, the Defendant may plead that the Plaintiff entered pending the *Writ*, or that he is an Alien. 2 *H.* 6. 13. *Br. Count* 58.

So an Executor, after an Imparlance, may plead in Bar *ne unques Executor*. 35 *H.* 6. 36. 22 *H.* 6. 27. 9 *Ed.* 4. 40.

But a Defendant cannot after a Continuance plead generally that the Plaintiff is made a Biſhop, or that his Wife is dead, unleſs he plead theſe Matters ſpecially, and ſhew that he was made a Biſhop after the laſt Continuance.

From whence we may collect, That if any Thing happens pending the Writ, and before Iſſue joined, that it may be pleaded in Bar, tho' there is a Continuance after ſuch Thing happened; but then you muſt plead and ſhew that it happened pending the Writ; but if after Iſſue joined, then you muſt plead and ſhew that it was after the laſt Continuance, without ſaying that it happened pending the Writ; and this Diſtinction was made by Jenour the Protonotary in 26 H. 8. 3. pl. 13. And my Lord Brook in abridging the Caſe approved the Diſtinction.

Now as to this Matter, 'tis true, That a Plea either to the Juriſdiction, Miſnoſmer, to the Writ, or in Abatement, cannot be pleaded after an Imparlance, except the Matter happen after the Continuance of the Action is abated, as by Death; but the Defendant may plead in Bar after an Imparlance; and the Reaſon is, becauſe that goes to deſtroy the Action. The Serjeant hath cited a Caſe *Anno* 72 *H.* 6. 10. to which I muſt add a *Quære*, Whether that King reigned ſo long? For I think he did not reign above 39 Years.

Gins verſus *Dams.*

Tempeſt. Hill. 9 W. III. Rot. 1825.

Northampton, ſſ. REPLEVIN for taking Averia, viz. A Mare, in a Place called Swine-Court Herne.

The Defendants being Overſeers of the Poor, juſtify the taking by Vertue of a Warrant of two Juſtices of the Peace, directed to them to demand 3 s. 4 d. debito modo impoſit' on the Plaintiff, for the Relief of the Poor of Wiwarſton, by Authority, & ſecundum tenorem cujuſdam Actus Parliamenti, &c. and he refuſing, they diſtrained; and upon Demurrer an Exception was taken to the Avowry, viz. That it is not ſufficient to ſay that the Money was aſſeſſed on him debito modo, for that is too general; but they ought to have ſhewed preciſely that he dwelt in the Pariſh, and that he uſed Land there, and the rather, becauſe they had waived the Benefit of pleading the General Iſſue, as directed by the Statute, and had pleaded the Matter ſpecially.

43 Eliz. cap. 2.

But it was anſwered, That they had not waived the Benefit of the Statute, becauſe they concluded their Avowry that they had taken the Diſtreſs ſecundum tenorem cujuſdam Actus, &c.

Then an Exception was taken by the Defendant's Counſel (and not by the Plaintiff's Counſel, as 'tis in the Book); that there was a Variance between the Writ and the Declaration; for the Writ was Quare ceperunt Averia, and the Declaration was for taking a Mare, which cannot be ſaid to be Averia.

The Year-Book of 7 *Ed.* 4. 31. *pl.* 18. is cited, but there is nothing there to this Purpoſe.

In *Cro. Eliz.* 185. the Writ was *Clauſum fregit*, and the Declaration was *Clauſa.* and for this Variance it was held ill; and the Defendants both in that and this Caſe had Judgment, for by Juſtice *Powel*, it had been naught ever after a Verdict; for ſo is 2 *Cro.* 829. where the Writ was for *raiſing* a Yard, and the Declaration was exalting it for making a *Gutter*; which is more than compriſed in the Writ.

Keilw. 35. So in 13 *H.* 7. in Treſpaſs, the Writ was for taking *Bona & Catalla*, and the Declaration was for taking one Bale of Wood; and it was held ill, tho' it doth not appear whether upon a Demurrer, or after a Verdict.

Keilw. 211. *B.* 1 *And.* 13. idem. The other Caſe in *Keilway* is in Treſpaſs; the Writ was for breaking his Cloſe, and making an Aſſault *in Homines & Servientes*, and the Declaration for aſſaulting *W. A. filium ſuum, & Urſulam & Wimifred' Servientes ſuas:* Now theſe were not Men, but Women and Servants; for there was but one Man-Servant; and this was held ill after Verdict, tho' my Lord *Anderſon*, who reports the ſame Caſe, puts a *Quære* upon it; for certainly *Homines* ſignify both Men and Women.

The

The Serjeant tells us, That my Lord Chief Justice *Treby* was of Opinion that this was helped by the Statute 16 & 17 *Car.* 2. commonly called the *Oxford* Act, after a Verdict, it being only Matter of Form, and so held in *Priestly* and *Langley*'s Case, but doth not tell us where 'tis to be found; however 'tis contrary to the Opinion of another Judge as aforesaid.

Clench versus *Cudmore.*

Pas. 3 W. & M. Rot. 304.

Essex; ss. REPLEVIN for taking his Cattle in Dovernots; the Defendant makes Cognizance as Bailiff to Mary and Elizabeth Savil, and to Mary Bennet their Guardian, for that the Place where, &c. is Copyhold, and Parcel of the Manor of Coggeshal; that the Defendant was seized of the said Manor in Fee, and that he granted the Place called Dovernots to the said Mary and Elizabeth Savil, and to their Heirs, and by the Rod deliver'd Seisin to them by their Guardian aforesaid; that the said Infants by their Guardian entered, and because the Cattle were there, the Defendant as Bailiff of the said Mary and Elizabeth Savil, and Mary Bennet, their Guardian, took them Damage-feasant.

The Plaintiff in Bar to the Cognizance confesseth the Place where, &c. is Copyhold; but that Thomas Savil, the Father of the said Infants, did by his Will devise the Guardianship of John Savil his Son, and of the said Mary his Daughter, to his Brother John Savil, and the Guardianship of his Daughter Elizabeth to John Cardel.

That the Defendant Cudmore, before the Grant made to the said Infants, granted Dovernots to John Savil the Son, who died seized, and that the Premisses descended to Mary and Elizabeth, as his Sisters and Coheirs; that John Savil, the Uncle and Guardian of Mary, devised a Moiety of the Premisses to the Plaintiff, and so justifies the putting in his Cattle.

The Defendant replies and confesses the Grant made to John Savil the Son, and the Descent to his Sisters as aforesaid; but saith as to Copyhold Lands, &c. of which there is no Guardian; and eo quod it belonged to him, secundum Consuetudinem Manerii, to assign Guardians to infant Copyholders of the said Manor, he did assign Mary Bennet, and at such a Court admitted her to be Guardian to them, and then he admitted the said Infants as Heir to their Brother, and so justifies the taking as aforesaid.

The Serjeant tells us, there is a short Report of this Case in 3 Lev. to this Effect, viz. That upon a long, intricate and ill Pleading, there was but one Point resolved by the Court, without any Manner of Regard to the Defects in Pleading; and that was, 3 Lev. 395.

That

That a Copyholder is not within the Statute of 12 Car. 2. to devise or dispose of the Guardianship of Infants, but that the Lord of the Manor, warranted by Custom, is Guardian to an Infant of Copyhold Lands, and this by Reason of the Meanness of that Estate; and if it should be otherwise, it might be very prejudicial to several Lords of Manors.

The Serjeant endeavours to convince the Reader that his Brother *Levinz* was mistaken in saying that there was but one Point resolved; for he tells us, the contrary will appear by his Report.

'Tis true, Serjeant *Levinz* hath stretched the Point to a very great Length, which our Serjeant hath divided into three Points, but still no more than what Serjeant *Levinz* comprehended in one; and therefore no more was resolved.

And this will appear upon reading the Case in both their Books; for our Serjeant tells us, the Opinion of the Court was, that a Lord of a Manor had not Power at Common Law, without a particular Custom to grant the Guardianship of an Infant Copyholder of his Manor; which Words do imply, That by a particular Custom, the Lord may grant, *&c.* and so is the Resolution in *Levinz*; for if the Lord is Guardian by a Custom, he may certainly grant the Guardianship to another.

Then he proceeds and says, that the Custom was well alledged; this likewise is implied by *Levinz*; for if the Custom had not been well alledged, the Lord cannot be Guardian.

'Tis further said, That the Statute did not destroy the Validity of such a Custom, nor extend to Copyholds in such Matters, because that would make an Alteration of the Custom, and might be prejudicial to the Lord.

And this is no more than what Serjeant *Levinz* has reported in a shorter Manner; for he says, that a Copyholder is not within the Statute, that is, he hath no Power by the Statute to devise the Guardianship of his Children, but that the Lord is Guardian by Custom, *&c.* which is the same Thing as to say that the Statute doth not extend to a Copyholder, and that it doth not destroy the Force and Efficacy of the Custom; for if the Copyholder is not within the Statute, all the rest is implied.

But I cannot blame our Serjeant for being a little peevish with his Brother, because he had given the Pleadings a very ill Name: Now I suppose he did not mean the Cognizance, nor the Rejoinder, in which he was concerned himself as Counsel for the Defendant; and if so, then it must be the Replication; which I suppose was drawn by our Serjeant, who was of Counsel for the Plaintiff; and it is enough to raise his Passion, by calling it a long, intricate, and ill Pleading.

And as to that Matter, he enters the List with his Brother, and submits it to the Judgment of others, upon the Examination of the Record it self; and what he afterwadrs reports, whether the Fault was in him, or his Brother?

But I do not find that he justifies his own Pleading; for he only reports what was moved and argued by himself, and what was ill pleaded by Serjeant *Levinz*.

ſſ. Whether a Lord of a Manor may de jure, and without a particular Cuſtom, grant the Guardianſhip of an Infant, Copyholder in Fee within his Manor, who is under the Age of 21?

I think he might have left out his laſt Clauſe; for if the Copyholder is an Infant, he muſt be under the Age of 21.

And as to this Point he argued, That the Lord hath no ſuch Power de jure, for he cannot diſpoſe of the Copyhold of a Lunatick without a particular Cuſtom; and the Caſes of Lunacy and Infancy fall under the ſame Reaſon; for they both ſtand in need of the Help and Aſſiſtance of others. Hob. 215. Hut. 16.

If a Copyhold deſcend to an Infant, the next Relation or Friend, to whom the Land cannot deſcend, ſhall have the Guardianſhip of him; which ſhews that the Lord is not intitled, unleſs it is by Cuſtom. 2 Rol. Abr. 40.

Therefore, if a Lord hath no Title but by Cuſtom, the next Queſtion will be,

Whether this Cuſtom was well alledged in the Pleading? And he argued it was not; for 'tis ſaid, that the Sitters being under 14 Years, and having no Guardian as to the Copyhold Lands, eo quod it belonged to the Defendant to admit and aſſign Guardians to ſuch Infants, according to the Cuſtom of the Manor; therefore he did admit, &c. Now this is not a poſitive Allegation of ſuch a Cuſtom, for he ſhould have ſaid, that infra Manerium talis habetur conſuetudo, &c. and then have ſet it forth; but to ſay that it belonged to him to admit, had been ſufficient, if he had added theſe Words, a tempore cujus contrarium memoria hominum non exiſtit; and ſo it hath been adjudged even after a Verdict. Cro. Eliz. 185. Latch 138. Aleyn 68.

There was another Exception taken to the Cognizance, which the Defendant made as Bailiff to the Infants; and that could not lie, becauſe it appears that they were under the Age of 14; and in ſuch Caſe they cannot make a Bailiff, therefore he ſhould have made Cognizance as Bailiff to the Guardian.

Beſides, the Replication was repugnant to the Cognizance; for by the one, it's ſaid that he, as Lord, had granted the Place where, &c. to the Infants, &c. and by the Replication he confeſſed that he had granted it to John their Brother, and that after his Death it deſcended to the Infants, as his Siſters and Heirs; ſo that by the one they were immediate Purchaſers, and by the other they had it by Deſcent, which is contradictory; he ought to have alledged the Grant to the Brother, and the Deſcent to his Siſters: 'Tis true, the Lord permits an Heir to plead his Admittance in the Nature of a new Grant; but this is to avoid an Inconvenience, becauſe it may be impoſſible for him to ſhew the firſt Grant, for that it might be made Time out of Mind; and if it was within Time of Memory, then the Cuſtom faileth. 4 Rep. 22. B.

But certainly the Defendant might at first have pleaded the Admittance to John as a Grant, and not have contradicted himself in this Manner. Lutwych for the Plaintiff, Levinz for the Defendant.

Winnard versus *Foster* & al'.

Trin. 3 W. & M. Rot. 464. C. B.

York, ff. REPLEVIN for taking a Cow and a Stack of Hay. One of the Defendants made Cognizance as Bailiff to Sir Christopher Wandesford, late Sheriff of Yorkshire, and the other as his Servant, for that one Nathaniel Day was possessed of those Goods, and that a Plaint was levied against him in the County-Court; and he not appearing upon Summons, there was an Attachment awarded against his Goods; and so justifies the taking them.

The Plaintiff replies, That he was possessed of the said Goods, and traversed the Possession of Day.

The Defendants take Issue upon the Traverse, and the Jury gave a Verdict for them as to the Cow, viz. That it was the Cow of Day, and assessed Damages and Costs to 40s. and as to the Hay they found for the Plaintiff, and assessed the like Damages and Costs.

Now in Avowries, where Part is found for the Plaintiff, and Part for the Avowant, it hath been a Question whether the Jury can assess Damages and Costs for the Plaintiff, because the Avowant himself is in Nature of a Plaintiff; and some Part of the Issue being found for him, that plainly shews that he had a Right to take some, tho' not all the Goods.

To clear this Matter, the Serjeant hath cited a Case of *Denton* and *Parsons*, which is reported in several Books, and is the same *in Terminis*, tho' under different Names; and he hath transcribed the Entry of that Judgment, which differs as much from the Books as they do from themselves.

The Case; *ff.* In Replevin the Defendant avowed for 36*l.* Rent, the Plaintiff as to 12*l.* pleads Payment; and as to the other 24*l.* she pleaded an Agreement and Satisfaction, one of these Issues was found for the Plaintiff, *viz.* that she paid the 12*l.* and the Jury assessed Damages and Costs; and the other was found for the Avowant, *viz.* That there was no such Agreement.

1 *Brownl.* 173. *Brownlow* tells us, that the Plaintiff shall have *Costs and Damages*, and the Defendant shall have a *Retorn' habend'*, but no *Costs and Damages*: 'Tis true, he said, that where Avowries are several, they shall recover *Costs and Damages* on both Sides; but that will not affect the Case at Bar, because that was a joint Avowry.

My

My Lord *Rolle* hath reported the ſame Caſe; and he tells us, *Whitlock* moved that the Plaintiff might have Judgment for his *Coſts and Damages*; but the Court was ſo far from giving any Judgment in it, that *Doderidge* bids him enter at his Peril. *Rol. Rep.* 37.

Juſtice *Croke* tells us, that the Jury aſſeſſing *Coſts and Damages* for the Plaintiff is void; for where any Part is found for the Avowant, there ſhall be no *Coſts and Damages* againſt him, becauſe by ſuch Finding, it appears that the Taking was lawful. *Cro. Jac.* 473.

The *Poſtea* is, *quoad primum exitum*, that *Mary Denton* paid the 12 *l.* and the Jury aſſeſſed *Damages and Coſts*; and as to the ſecond Iſſue, they find that no Agreement was made, and aſſeſs *Damages and Coſts* likewiſe for the Avowant.

The Entry of the Judgment is *quod Maria Denton capiat per breve, &c.* and that the Avowant eat *inde ſine die*, and that he have a Retorn of his Goods, *Damages and Coſts*; *& conſideratum eſt*, that *Mary Denton ſit quieta* of the ſaid 12 *l.* but that ſhe may not have any *Damages and Coſts* aſſeſſed by the Jury, *eo quod videtur eidem Curiæ hic*, that *Damages and Coſts* were wrongfully aſſeſſed by the Jury.

The Entry of the Judgment in the principal Caſe was the ſame in Subſtance.

The Reporter tells us there are various and contrary Judgments in Replevin, where Part is found or adjudged for the Plaintiff, and Part for the Defendant; but there are no ſuch Precedents in any of the Books of Entries, but in the firſt and ſecond Books of Judgment; which are in private Hands: The Entry of it is in Mich. 15 Jac. II. Rot. 458. B. R. as follows,

ſſ. In Replevin againſt A. and B.

The Plaintiff had a Verdict againſt A. and Damages and Coſts, and B. was acquitted of the Taking, &c. and Damages and Coſts were aſſeſſed for him; and the Judgment was, That the Plaintiff ſhould be amerced as to B. but that B. ſhould have neither Damages or Coſts, becauſe he ought not to have it by Law. 1ſt Book of Judgments, fol. 115.

In 2 Car. I. The Property of an Heifer (which was Part of the Goods taken) came in Queſtion, and it was found for the Defendant, and Damages and Coſts; and another Iſſue was found for the Plaintiff, and Damages and Coſts aſſeſſed by the Jury for him; and he had Judgment for his Damages and Coſts; and the Defendant had Judgment that he ſhould recover, but not his Damages and Coſts aſſeſſed by the Jury for taking the Heifer; but his Damages occaſione Præmiſſorum to ſuch a Sum per Diſcretionem of the Juſtices, at his Requeſt, and in that Behalf ſuſtained according to the Form of the Statute, &c. which he thinks to be 4 Jac. cap. 3. and probably 'tis ſo, becauſe that Statute takes in not only thoſe Actions wherein Coſts are given by particular Statutes as Replevin, Debt, Treſpaſs on the Caſe, Detinue, Accompt and Ejectment, but all other Actions whatſoever.

It may not be improper in this Caſe to ſhew in what Actions, Coſts were given by particular Statutes, and how it ſtood at Common Law.

ſſ. Before

But certainly the Defendant might at first have pleaded the Admittance to John as a Grant, and not have contradicted himself in this Manner. Lutwych for the Plaintiff, Levinz for the Defendant.

Winnard versus *Foster* & al'.

Trin. 3 W. & M. Rot. 464. C. B.

York, ff. REPLEVIN for taking a Cow and a Stack of Hay. One of the Defendants made Cognizance as Bailiff to Sir Christopher Wandesford, late Sheriff of Yorkshire, and the other as his Servant, for that one Nathaniel Day was possessed of those Goods, and that a Plaint was levied against him in the County-Court; and he not appearing upon Summons, there was an Attachment awarded against his Goods; and so justifies the taking them.

The Plaintiff replies, That he was possessed of the said Goods, and traversed the Possession of Day.

The Defendants take Issue upon the Traverse, and the Jury gave a Verdict for them as to the Cow, viz. That it was the Cow of Day, and assessed Damages and Costs to 40s. and as to the Hay they found for the Plaintiff, and assessed the like Damages and Costs.

Now in Avowries, where Part is found for the Plaintiff, and Part for the Avowant, it hath been a Question whether the Jury can assess Damages and Costs for the Plaintiff, because the Avowant himself is in Nature of a Plaintiff; and some Part of the Issue being found for him, that plainly shews that he had a Right to take some, tho' not all the Goods.

To clear this Matter, the Serjeant hath cited a Case of *Denton* and *Parsons*, which is reported in several Books, and is the same *in Terminis*, tho' under different Names; and he hath transcribed the Entry of that Judgment, which differs as much from the Books as they do from themselves.

The Case; *ff.* In Replevin the Defendant avowed for 36*l.* Rent, the Plaintiff as to 12*l.* pleads Payment; and as to the other 24*l.* she pleaded an Agreement and Satisfaction, one of these Issues was found for the Plaintiff, *viz.* that she paid the 12*l.* and the Jury assessed Damages and Costs; and the other was found for the Avowant, *viz.* That there was no such Agreement.

1 *Brownl.* 173. *Brownlow* tells us, that the Plaintiff shall have *Costs and Damages*, and the Defendant shall have a *Return' habend'*, but no *Costs and Damages*: 'Tis true, he said, that where Avowries are several, they shall recover *Costs and Damages* on both Sides; but that will not affect the Case at Bar, because that was a joint Avowry.

My

My Lord *Rolle* hath reported the ſame Caſe; and he tells us, *Whitlock* moved that the Plaintiff might have Judgment for his *Coſts and Damages*; but the Court was ſo far from giving any Judgment in it, that *Doderidge* bids him enter at his Peril. *Rol. Rep.* 37.

Juſtice *Croke* tells us, that the Jury aſſeſſing *Coſts and Damages* for the Plaintiff is void; for where any Part is found for the Avowant, there ſhall be no *Coſts and Damages* againſt him, becauſe by ſuch Finding, it appears that the Taking was lawful. *Cro. Jac.* 473.

The *Poſtea* is, *quoad primum exitum*, that *Mary Denton* paid the 12 *l.* and the Jury aſſeſſed *Damages and Coſts*; and as to the ſecond Iſſue, they find that no Agreement was made, and aſſeſs *Damages and Coſts* likewiſe for the Avowant.

The Entry of the Judgment is *quod Maria Denton capiat per breve, &c.* and that the Avowant eat *inde ſine die*, and that he have a Return of his Goods, *Damages and Coſts*; *& conſideratum eſt*, that *Mary Denton ſit quieta* of the ſaid 12 *l.* but that ſhe may not have any *Damages and Coſts* aſſeſſed by the Jury, *eo quod videtur eidem Curiæ hic*, that *Damages and Coſts* were wrongfully aſſeſſed by the Jury.

The Entry of the Judgment in the principal Caſe was the ſame in Subſtance.

The Reporter tells us there are various and contrary Judgments in Replevin, where Part is found or adjudged for the Plaintiff, and Part for the Defendant; but there are no ſuch Precedents in any of the Books of Entries, but in the firſt and ſecond Books of Judgment; which are in private Hands: The Entry of it is in Mich. 15 Jac. II. Rot. 458. B. R. as follows,

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It may not be improper in this Caſe to ſhew in what Actions, Coſts were given by particular Statutes, and how it ſtood at Common Law.

ſſ. Before

ff. Before the Statute 7 *H.* 8. *cap.* 4. the Avowant was to defend his Right at his own Expence, though he diſtrained for a very juſt Cauſe; yet at Common Law he was not allowed Coſts or Damages, for which Reaſon many Perſons would replevy their Goods merely for Vexation.

To remedy this Miſchief, that Statute was made, by which it was enacted, That where *Common Recoveries* are ſuffered of Manors, the Recoverors may diſtrain for *Rent-Services* and Cuſtoms, and make Avowry and Cognizance for the ſame; and if it is found for them, or the Plaintiff is barred, they ſhall recover *Damages and Coſts.*

Now Common Recoveries being always had by Conſent and Agreement between the Parties, 'tis very plain, that the Recoverors came into thoſe Manors, under the Title of thoſe Lords, who ſuffered ſuch Recoveries; and they had no Remedy at Common Law to compel the Tenants and Freeholders to attorn to them; and without Attornment, they could neither diſtrain or avow for Rents, Cuſtoms and Services which lie in Tenure; and therefore that Statute was made to enable them to diſtrain, *&c.*

But becauſe that Act extended to Perſons only, which held Lands by Rents, Cuſtoms and Services of particular Manors, therefore *Anno* 21 *H.* 8. *cap.* 19. it was enacted, That the Avowant, *&c.* ſhall recover Coſts and Damages, not only for ſuch Rents and Services; but likewiſe where he avows or makes Cognizance for Damage-Feaſant, or *other Rent or Rents.*

The Statute above-mentioned extending only to Avowries, and there being many other Actions within the ſame Miſchief, the Par-
4 *Jac.* 1. *c.* 3. liament, Anno 4 *Jac.* 1. made another Act, in which the Statute 21 *H.* 8. *cap.* 15. is recited, which gives Coſts to the Defendant in Actions of Debt, Treſpaſs on the Caſe, Detinue and Accompt; but Actions of Treſpaſs and Ejectment were omitted; therefore that Statute was made, by which Coſts were given to the Defendants in thoſe Actions, or any *other Actions whatſoever*; wherein the Plaintiff or Defendant might have Coſts.

2 *Cro.* 520. It was by Reaſon of thoſe general Words, that in Replevin, where the Defendant juſtified the Taking, *&c.* for *an Amerciament in a Court-Leet*; that even in that Caſe he had his Coſts, though ſuch Juſtification is neither for Rent-Services, Cuſtoms, or for any other particular Actions for which Coſts were given by any of the Statutes of *H.* 8. above-mentioned.

In the ſecond Book of Judgments, fo. 204. N°. 9. The Property of Part of the Goods, was found to be in the Plaintiff as Adminiſtrator, and Damages and Coſts tared by the Jury, who found the Property of the Reſidue to be in the Defendant; and as to that the Plaintiff was amerced, and the Defendant was acquitted; but the Defendant had neither a Retorn' Habend' or Damages, or Coſts: 'Tis true, it doth not appear whether this Judgment was given either before or after the Statute.

In the ſame Book, fo. 210. N°. 28. The Defendant tendered two Iſſues, one of which was non cepit, which was found againſt him; and

and the other Iſſue for him; and ſeveral Judgments given for both to have Damages and Coſts aſſeſſed by the Jury; and this was before the Statute 4 Jac. 2.

In the ſame Page there is an Avowry for a Rent and an Amerciament, and a Verdict for the Defendant as to the Rent, and for the Plaintiff as to the Amerciament: And the Judgment was, That the Plaintiff nil capiat as to one, and the Defendant to be amerced as to the other, and to have a Return, &c. and his Damages aſſeſſed by the Jury, but the Plaintiff had neither Damages or Coſts.

In the ſame Book, and in the next Page, two avow for the Taking, &c. for 10 s. for an Amerciament, and for 12 s. 7 d. Rent, and 24 s. 2 d. Relief, and as to the Amerciament and Relief, the Plaintiff demurred, and they were at Iſſue as to the Rent; and the Plaintiff had Judgment upon the Demurrer for the Amerciament, and the Defendant had Judgment for the Relief, and a Retorn' Habend'; that the Plaintiff had neither Damages or Coſts, becauſe the Avowant had a ſufficient Cauſe to diſtrain.

In the ſame Book, p. 215. N°. 4. ſt. The Defendant avowed for an Amerciament in a Court-Leet, and likewiſe for another Cauſe; the Iſſue as to the Amerciament was found for the Avowant; and the Judgment was, That he ſhould have a Return, &c. but no Damages or Coſts.

The Reaſon given by the Book is, becauſe Damages and Coſts were not due by the Statute upon an Avowry, for an Amerciament in a Court-Leet: 'Tis true, ſuch an Avowry is not comprehended in either of the Statutes of *H.* 8. but it falls under the general Words of the Statute 4 *Jac.* which takes in all Actions where the Plaintiff or Defendant might have Coſts; ſo that this Judgment muſt be given before that Statute.

But the Serjeant at laſt hath added a *Nota*, That the Judgment in the principal Caſe, that both the Plaintiff and Defendant ſhould have their ſeveral Coſts, is different from any of the Precedents above-mentioned: for the Recovery here is joint, and likewiſe a joint Iſſue taken upon the Property, both of the Cow and the Stack of Hay, and the one was found to be in the Defendant Day, and the other in the Plaintiff.

Eyloe verſus *Cooke*.

Tempeſt. Paſ. 5 W. & M.

London, ſſ. REPLEVIN for taking eight Cane-Chairs, &c. in the Pariſh of Cripplegate.

The Defendant, Proteſtando That the Declaration was inſufficient, becauſe the Plaintiff had not ſet forth any certain Place in

the ſaid Pariſh where the Goods were taken; then he avowed, &c. that the Place where, &c. was a Houſe known by the Name of the Crown, ſituate in the ſaid Pariſh, on the South ſide of a Street called Barbican; of which Thomas Fotherly was ſeized in Fee, and being ſo ſeized, conveyed the ſame to Sir John Mounſon and Thomas Dockwra and their Heirs, to the Uſe of the Lady Anne Whitfield for Life, who made a Leaſe of the Premiſſes to the Defendant for ſixty Years, if ſhe the ſaid Lady Whitfield ſhould ſo long live.

That the Defendant demiſes it to the Plaintiff for a Year, and afterwards as long as they two ſhould agree under the yearly Rent of 14 l. 10 s. to be paid quarterly, by Vertue whereof the Plaintiff entered, and ſo avowed for 29 l. Rent due for two Years.

The Defendant pleads in Bar to the Avowry, That the Lord Willoughby was ſeized in Fee of a Houſe in Barbican, called Kent-Houſe, of which the locus in quo was Parcel; that he deviſed the ſaid Houſe to Peregrine Bertie, in Tail male, after the Death of Suſan, Counteſs of Kent, Remainder to his own right Heirs.

That both the Teſtator and the Counteſs were dead, that Peregrine entered, and had two Sons, Robert and Nicholas, and died; that after his Death the Premiſſes deſcended to Robert, who died without Iſſue, and thereupon the ſame deſcended to Nicholas, and after his Death, to his Son and Heir Peregrine Bertie, who was diſſeiſed by the ſaid Fotherly, who made the Settlement as aforeſaid; and that afterwards Peregrine, the Son and Heir of Nicholas, entered.

The Plaintiff, proteſtando That the Lord Willoughby was not ſeized, replyed, that before the ſaid Fotherly had any Thing in the Premiſſes, Sir Herbert Whitfield was ſeized thereof in Fee, and being ſo ſeized, made a Feoffment to Fotherly and Merridale, and their Heirs; that Fotherly ſurvived, and was ſeized in Fee, and continued both the Seiſin and Poſſeſſion of the ſaid Houſe for twenty Years and more, under that Title, without any Claim or Entry by the Berties, by which their Right of Entry was barred by the Statute; and then traverſes that Peregrine was diſſeiſed.

The Serjeant tells us, That after this Replication there was no farther Proceeding in this Caſe.

Oſmere verſus *Sheafe*.

Cooke. Trin. 5 W. & M. Rot. 1400.

Kent, ſſ. IN Replevin the Defendant made Cognizance as Bailiff to Daniel Wilmot; ſetting forth, That John Chapman was ſeized of the Place where, in Fee; and being ſo ſeized, did by Indenture dated 4 Decembris, Anno 13 Car. 1. grant a Rent-Charge of 14 l. per Annum, iſſuing out of the ſame, to one Moravia Taylor, and her Heirs.

That after her Death, the ſaid Annuity deſcended to Mary Waller as Daughter and Heir of the ſaid Moravia; who by Indenture bearing Date 23 Jan. 20 Car. 2. in Conſideration of natural Love and Affection, did covenant to ſtand ſeized thereof, to the Uſe of Sir William Brodnay and his Heirs, if ſhe ſhould die without Iſſue.

That the ſaid Mary Waller afterwards died without Iſſue, and that the ſaid Sir William Brodnay, in Conſideration of 215 l. granted the ſaid Rent-Charge to Nathaniel Wilmot and his Heirs, to which Grant the ſaid John Chapman, who had the Freehold and Inheritance, attorned.

That after the Death of the ſaid Nathaniel Wilmot, the ſaid Rent Charge deſcended to his four Sons, as Co-heirs to their Father, of which the ſaid Daniel Willmot was one; the ſaid Lands and all Rent-Charges iſſuing out of the ſame, being Gavelkind, and ſo made Cognizance as Bailiff to the ſaid Daniel, for a fourth Part of the Rent.

The Plaintiff craves Oyer of the Deed, which is ſet forth in hæc verba, the Subſtance whereof as to the Matter in Queſtion was, viz. To all Chriſtian People, *&c.* Know ye, That I *Mary Waller*, for the Love which I bear to my Kinſman Sir *William Brodnay*, do *give and grant* to him and his Heirs, my Annuity of 14 *l. per Annum*, iſſuing, *&c.* To have and to hold to him and his Heirs, from and after my Deceaſe; if I die without Child of my Body begotten, living after my Deceaſe.

There was a Demurrer, and a Joinder in Demurrer.

The Serjeant tells us, This Caſe is in 3 *Levinz*, which is very true, and the Queſtion was, Whether this Deed ſhould operate as a Covenant to ſtand ſeized? 3 *Lev.* 370.

It was objected that it was void, for it could not operate as an Uſe, becauſe the Intention of the Party appeared, that it ſhould operate as a Grant, by the Words *give* and *grant* in the Deed it ſelf; which are Words proper for a Common Law Conveyance.

Now though there may be ſome Book-Caſes which ſeem to warrant, that Conveyances ſhall operate according as they are penned; yet of late the Judges have a greater Conſideration to the paſſing the Eſtate it ſelf, than to the Manner by which it was paſſed; and therefore gave Judgment for the Defendant.

This was the only Point that was in Debate in this Caſe, but the Serjeant hath ſtarted another Queſtion, *viz.* Whether the Cognizance is good, becauſe in the Name of one Copartener for his Proportion of the Rent; which cannot be without making himſelf Bailiff to the reſt?

He tells us, That in Mich. 7 W. 3. B. R. in Replevin between Page and Stedman,

The Caſe was, Simon Bennett made a Leaſe of Lands to one Gueſlin for Years, the Reverſion deſcended to his two Daughters and Copareeners, Grace who married John Bennett, and to the Counteſs of Salisbury, and in Replevin the Defendant made Cognizance as Bailiff to one of them; and upon Demurrer it was held ill, becauſe it ſhould have been as Bailiff to both.

So

So in 6 W. B. R. between Pullen and Palmer it was adjudged, That one Joint-Tenant cannot avow for a Rent-Charge, without making himself Bailiff to his Companion.

This is only a Report of one Serjeant from another, so not of any great Authority to be relied on; but it was not so much as mentioned in the principal Case: But as to the Matter of Law in this Case, it hath been held, That where Coparceners make a Lease for Years rendering Rent, if they bring an Action of Debt for their Rent, they must join, because the Contract is entire; but if they avow for the same Rent, they may sever, because the Reversion is in both.

Tonkin versus *Crocker* & *Billing*.

Cooke. Trin. 6 W. & M. Rot. 507.

Cornwal, ss. REPLEVIN, the Defendant made Cognizance as Bailiff to William Mohun Esq; for that Hugh Tonkin was seized in Fee of a Messuage and five Acres of Land, of which the Place where, &c. was Parcel, and that he held the Premisses of the said William Mohun, as of his Manor of Mythian by Fealty, Rent of 4 s. and Suit to the Court of the said Manor bis per Annum, of which Services the said William Mohun was seized by the Hands of the said Hugh Tonkin, as by the Hands of his very Tenant, and so makes Cognizance for the Rent for one Year, and for Suit to the Court.

The Plaintiff, by Protestation That William Mohun was not seized of the Services, pleads in Bar, and confesses that he held the Premisses of him as of his Manor of Mythian, by the Rent of 4 s. per Annum, but traverses the Tenure by Fealty and Suit of Court.

The Defendants take Issue upon the Traverse, and thereupon a a Special Verdict was found.

ss. That William Mohun was seized in Fee of the Manor of Mythian; and that Time out of Mind there was an antient Court there held before the Steward twice in every Year, and there were Freehold Tenants and Suitors, who did Suit at the said Court, and that the Plaintiff and his Predecessors were Freehold Tenants of the said Manor, and held the Premisses of the said William Mohun, and his Predecessors, Lords of the said Manor, by Fealty, and the Rent of 4 s. by the Year, and also by due Suit at the Court of the said Manor twice every Year, as mentioned in the Avowry.

They farther find, that for twenty Years last past, there was but one Freehold Tenant or free Suitor in the said Manor, which was the Plaintiff, but that Time out of Mind there were several Customary Tenants and Suitors there; they find that the Rent and Services were in Arrear, and make a general Conclusion.

The Serjeant seldom fails to acquaint us with the Names of the Counsel who argued, especially if he was of either Side himself; but in this Case he has forgot to state the Question; and though the Arguments are confusedly reported, yet I shall endeavour to collect the Sense, and make it as intelligible as I can.

ff. Every Manor consisteth of Freehold and Copyhold Tenants, and in effect, comprehendeth two Courts; one is called a Court-Baron, which *ex vi termini* must be the Court of Freeholders; and in this Court the Free Tenants are Judges, of which there must be two at least to make such a Court.

The other is a Court for the Copyholders; and there the Lord or his Steward is Judge; and as to this Court there need not be any Free Tenants.

Now the Defendant having made Cognizance amongst other Things for Suit *ad Curiam Manerii, &c.* those who argued for the Plaintiff held, That must be intended a *Court-Baron*, because such a Court is incident to every Manor, and there is none without it; but Mr. *Mohun* could have no such Court in his Manor of *Mythian*, because the Jury had found there is but one Free Suitor there, when the Law expresly requires there should be two.

But the principal Point was, Whether the Court mentioned in the Cognizance, and that found by the Jury were the same? Because according to the common Acceptation in Law, the one must be a *Court-Baron*, for the Reasons aforesaid; but that found by the Jury must be a Customary Court; because 'tis found to be held *Coram Seneschallo & his per Ann'*; when a Court-Baron is always held *coram sectatoribus*, for they are Judges; and it is usually held from three Weeks to three Weeks.

If therefore the Court mentioned in the Cognizance, cannot be a *Court-Baron*, it must then be a *Customary Court*; for so 'tis found by the Verdict: And then the Defendant ought to have prescribed to have such a Court, because 'tis not of common Right, nor incident to a Manor as a *Court-Baron* is always esteemed to be.

Those who argued on the other Side said, There may be a Manor where there is but one Freehold Tenant; for if all the Lands held of a Manor, should escheat to the Lord, except only the particular Lands of one Tenant, or if the Lord refuse all the Tenures and Services of his Free Tenants, excepting one, 'tis plain, that the Seigniory still continues between the Lord and that Tenant; and that it cannot be a Seigniory in Gross, because it was never severed from the Manor; it must therefore be Parcel of the Manor, and if so, the Manor it self must have a Being. 1 *And.* 257.

But as to the principal Point, though the Verdict hath found that the Court was held *Coram Seneschallo*, yet it doth not follow from thence that it must be a *Customary Court*; because in Fact, every *Court-Baron* is held *Coram seneschallo*, though the Suitors are Judges.

My Lord Coke tells us, That in every hundred Court, the Suitors are Judges; but the Style of that Court always is this: ff. Curia, &c. tent' coram *A. B.* Seneschallo ibidem. He says the 4 Inst. 267, 268.

same Thing of a Court-Baron, and this is agreeable both to Authorities in Law, and to Precedents in the Books of Entries.

I have examined all those Authorities and Entries which are cited in this Case, the Substance whereof are as followeth.

Cro. Eliz. 791. *Noy* 20. idem.

ff. In Replevin, the Defendant made Cognizance as Bailiff to Sir *Fulk Grevill*, for an Amerciament, *&c.* setting forth, That he was seized in Fee of the Manor of, *&c.* and so *prescribed* to have a *Court-Baron*, there to be held before his *Steward*; and upon Demurrer those who argued to maintain this Prescription thus distinguish'd. *ff.* That though, 'tis true, a Lord of a Manor cannot *prescribe* to have a *Court-Baron*, because 'tis of common Right, and incident to it, yet 'tis not of common Right, that it should be held *before a Steward*, but before the Suitors who are the Judges of such a Court; and therefore a Man may *prescribe* to have a Court-Baron held *coram seneschallo.*

But the Court did not allow this Distinction, for they held, That a Court-Baron must always be held *coram sectatoribus*: They agreed, That the Authority of such a Court might be enlarged by Prescription; but still it must be held *coram sectatoribus.*

So that this Case proves no more but that the Suitors are Judges in a Court-Baron, but nothing is said of the Style of the Court.

2 *Cro.* 582. In 18 *Jac.* the like Judgment was given upon a Motion in Arrest of Judgment, in an Action of Debt for an Amerciament, *&c.* *ff.* That a Man cannot *prescribe* to have a Court-Baron to be held *coram seneschallo*, because it ought to have been *coram sectatoribus.*

Cro. Car. 497. In *James* and *Tutney*'s Case, which was likewise in Replevin, the Defendant made Cognizance as Bailiff to Sir *John Stowell*, *&c.* and prescribed to have a *Court* held twice every Year *before the Steward*, *&c.* but in that Case there was no Notice taken of the Pleading; the Question was only concerning a By-Law.

But now in 1 *Mod.* 173. there the Court held, That a Man may *prescribe specially*, to have a Court-Baron held *coram seneschallo*; and the Book tells us, That it hath been so adjudged, but doth not say where or when; and I very much question the Authority of that Case, for 2 *Cro.* 582. is there cited, which proves the quite contrary: Besides, 'tis there affirmed, that a Man cannot have a Court-Baron, without prescribing for it, which certainly must be a Mistake, because the Books generally agree that a Prescription will not lie in such a Case, because a Court-Baron is of common Right incident to every Manor, and created by Law.

Yelv. 192.

In 2 *Jones* 23. the Court was of the same Opinion. *ff.* That a Court-Baron may be held *coram seneschallo secundum cons. Manerii*, and that this was also my Lord *Vaughan*'s Opinion, though the Suitors are Judges.

These are all the Book-Cases, where the Reader may see, that the latter Opinions do not agree with the former.

Coke's Ent. 118. *b.* 570. *B.*

Then as to the Precedents, 'tis true, in my Lord *Coke*'s Entries, there is a Prescription for a Court-Baron to be held *coram seneschallo*, and in the same Book 570. the Defendant made Cognizance for an Amerciament in a Court-Baron held *coram seneschallo.*

In *Rastal's Entr.* 553. a Man prescribed to have a Hundred and a Torn thereunto belonging, to be held twice in a Year *coram seneschallo*.

In *Winch's Entr.* 1014. there is only a Court mentioned to be held *coram seneschallo*; which may be a *Customary Court*; for it doth not appear by the Precedent to be a Court-Baron.

And these are all the Precedents.

But in the principal Case the Court gave Judgment for the Defendant, viz. That there was no Variance between the Cognizance and the Verdict; for admitting that the Court mentioned in the Cognizance shall be taken to be a Court-Baron, yet such a Court may be held coram seneschallo: But it appears to be otherwise upon the very Plea it self; for 'tis set forth, That the Court was held twice in a Year, which cannot be a Court-Baron, according to the general Usage, for that is held but once a Year. 1 Leon. 316.

Then as to the Manor, admitting that two Tenants are requisite to every Manor, and that a Court cannot be held without them; and in this Case the Jury have found, That there was but one Tenant, yet it cannot be a Question whether the Manor is in being; for it appears on both Sides, That there was such a Manor as Mythian; this was alledged by the Defendants in their Cognizance, viz. That the Plaintiff held his Lands of the Manor of Mythian, and the Plaintiff in Bar to the Cognizance, confesses it to be true, that he held it de manerio præd' by the yearly Rent of 4 s. but not by Fealty, Rent, and Suit of Court; so that the Question between them is concerning the quantum of the Services.

The Verdict and the Cognizance exactly agree in every Circumstance, only the Cognizance doth not mention before whom the Court was held, which is not very material; but the Verdict finds the Fact, viz. That it was held before the Steward.

Now admitting that in Judgment of Law, the Manor should be distroied, because there was but one Freeholder for twenty Years last past; yet it may be a Question, Whether this subsequent Matter so found by the Jury, shall be regarded, because 'tis contradictory to what they had found before; for they find that the Manor of Mythian, before the Caption, &c. was an antient Manor; that William Mohun was seized in Fee, &c. and that there had been an antient Court held before the Steward of that Manor, and that the Plaintiff and his Ancestors were Tenants thereof; and then at last they say, That for twenty Years past, there had been but one Freeholder there, by which they seem to insinuate, That there was no such Manor at all.

But the Court gave very little Regard to this Matter, because the Jury are sworn to try the Point in Issue, and are never allowed to raise Questions concerning those Things in which the Parties are agreed. 2 Rep. 4. *B.* 1 Leon. 323. 3 Leon. 80, 209. *Savil* 112. Palm. 19. Owen 91. 2 Mod. 4. 2 Roll. Abr. 692.

This appears plainly by all the Books cited in the Margent, which I have examined carefully, and find them all agree in this Matter.

Lastly, there was an Exception taken to the Cognizance. ff. That the Defendants ought to have alledged, That William Mohun was seized

ſeized in Fee of the Manor of *M.* &c. and they only ſay, That the Plaintiff held of him ut de manerio ſuo.

But the Precedents agreeing with this Manner of Pleading, that Exception was diſallowed.

Co. Ent. 597. *B. Raſt. Ent.* 565. *B. pl.* 1. 3. ad 566. *pl.* 4. *Winch. Ent.* 973.

'Tis true, the Precedents in the Margent are ſo; which I have examined; but in *Raſtal's Ent.* 565. *B. pl.* 2. there is a *Seiſin in Fee* alledged in the Owner of the Manor; and ſo it is alſo in *Winch* 937.

Weekes verſus *Peach.*

Tempeſt. Mich. 6 W. & M. Rot. 729, & 730.

Bedford, ſ. IN Replevin, The Defendant avowed the taking, &c. for that Nicholas Clement being ſeized in Fee of the Place where, &c. did by his laſt Will deviſe it to Thomas Weekes, and to the Heirs of his Body lawfully begotten; and for want of ſuch Iſſue, to the right Heirs of the Teſtator.

Upon Condition that the ſaid Thomas Weekes and his Heirs ſhould pay an yearly Rent-charge of 15 l. per Annum, both to Elizabeth Clement and Margarent Clement, and to the Heirs of their Bodies lawfully begotten.

Provided if either the ſaid Elizabeth or Margaret ſhould die without Iſſue then living, that then the Survivor ſhould have the ſaid Annuity for her Life, and that after the Death of the Survivor, the whole 30 l. per Annum ſhould be paid to the Heirs of the Body of ſuch Survivor, &c.

That the Teſtator died, and Elizabeth married Thomas Alleſtree.

That in Craſtino Trinitatis, Anno 30 Car. II. the ſaid Thomas Alleſtree and his Wife levied a Fine of her Annuity to Gabriel Metcalf and his Heirs, by Vertue whereof he was ſeized in Fee, &c. and afterwards a Writ of Entry was brought againſt him Teſte 17 Maii 30 Car. II. who vouched the ſaid Alleſtree and his Wife, and they the common Vouchee; ſo that a common Recovery was had againſt them to the Uſe of the ſaid Gabriel in Fee, who granted the ſaid Annuity of 15 l. per Annum to the Defendant Peach and his Heirs; that the Tenant attorned, and the Rent being behind, the Defendant diſtrained.

The Plaintiff by Proteſtation ſaith, That the Avowry was inſufficient, becauſe it was alledged that Gabriel Metcalf, on the 17th of May, &c. was ſeized in Fee by Vertue of a Fine levied in Craſtino Trinitatis, which could not be, becauſe the 17th of May was before Craſtino Trinitatis; for that was on the 27th of May.

There is another Proteſtation, That he did not know any Attornment made by any particular Tenant, and then he pleads in Bar to the Avowry, That before any Rent was in Arrear, Elizabeth died without Iſſue.

There was a Demurrer and Joinder in Demurrer.

This Case is reported without any Order or Method, as several other Cases are.

I do not find the Counsel on either Side took any Notice of the Pleadings; but one of the Judges held, That tho' *Gabriel Metcalf* was not a perfect Tenant of the Freehold on the 17th of *May*, by a Fine levied *Crastino Trinitatis*; yet he was so before the Return of the Writ of Entry; and therefore a sufficient Tenant to the *Præcipe* at that Time. 1 *Mod.* 218.

But then as to the Matter in Law there were two Points,

1. This being a Rent newly created, and having no Relation to the Estate in the Land, then the Question will be, Whether a Remainder could be of such a Rent, which, (to distinguish it from other Rents) is called a Rent de novo?

2. Admitting such a Remainder to be good, then the next Question will be, Whether the Estate in the Rent was not enlarged by this Recovery? That is, Whether the Recoveror had not gained a Fee-Simple in it? Which Estate must continue in him, notwithstanding the Death of one of the Tenants in Tail without Issue.

As to the first of these Points it was argued, That a Remainder may be of a Rent de novo; it was so adjudged in the Case of Smith and Farnaby. Carter. 52. Sid. 285. 1 Lev. 144.

If. That a Rent devised de novo to one, and the heirs males of his Body; and for Default of such Issue, that it shall remain to another and his heirs; that this is a good Remainder.

'Tis true, that Case is thus reported; but there is no Reason given for the Judgment; which I cannot think to be a Deficiency in those who gave it, but rather in those who reported the Case.

Now the Reason why this Remainder of a Rent *de novo* may be good is, If. The Testator had certainly a Power to dispose the whole Fee-Simple of his Estate to any one; and if so, he may give a Rent issuing out of it to one, the Remainder to another; for it being by the same Will, it passes as one Estate, and the Remainder vests at the same Time.

Now on the other Side it was argued, 1. That there could be no Remainder of such a Rent, because it was a Thing not in being; and 'tis absurd to say, that any Thing remains which doth not exist.

2. The Estate in the Rent was enlarged by this Recovery, that is, The Estate Tail was turned into a Fee-Simple, because by the Writ of Entry a Fee-Simple was demanded; and the Judgment was, That the Demandant shall recover the Fee; for he can obtain no other Estate in that Action; and when he hath Judgment, the Fee must continue in him, notwithstanding the Death of the first Tenant in Tail without Issue.

To which it was answer'd, That probably the Advowant, by Vertue of this Common Recovery, might be seized in Fee of this Rent, but still 'tis determinable upon the Death of Margaret the other Sister without Issue; and it ought to appear in the pleading that she, or some of her Issue were living; the Case then is shortly thus,

If A. devised a Rent to B. in Tail, B. suffered a Common Recovery to the Use of C. and his Heirs; then B. died without Issue; the Rent is determined, because by the Recovery the Estate could not be enlarged, to the apparent Injury of the Ter-tenant; and the Recovery could not give it a longer Continuance than the Testator himself had appointed.

Something was said to another Point: If. Whether this was a Remainder vested or contingent? And as to that it was argued, That it was in Nature of an executory Devise, and contingent.

If it had been an absolute Devise to Margaret, upon the Death of Elizabeth without Issue, this had been a Remainder vested.

But 'tis quite otherwise; for 'tis a Devise to the Survivor, after the Death of her which should first die without Issue; and this is in Nature of an Executory Devise, because it doth not presently take Effect in any certain or determinate Person, but vests in the Survivor; which is incertain; and if so, it shall not be barred by a Common Recovery.

That there was a very great Difference between this Case and that of Farnaby and Smith; for in that Case, he who was the Owner and had the Inheritance of the Land it self, granted a Rent-charge out of it to B. in Tail, Remainder over to C. in Fee; there a Recovery suffered by B. barred the Estate-Tail and Remainder in Fee, and there was no Manner of Injury done to the Owner of the Land out of which the Rent-charge issued, because by his own Grant he had brought a perpetual Incumbrance upon the Land; which was the same as well after the Recovery suffered as before.

But in this Case there was no Devise of the Fee; 'tis true, the Testator had created an Estate-Tail in the Rent, which was to determine when that was spent; and therefore, if the Tenant in Tail in Possession could enlarge that Estate by suffering a Common Recovery, that is, if he could turn it into a Fee Simple, this would be a plain Injury to the Owner of the Land.

The Court seemed to incline to this Opinion, but gave no solemn Judgment; but the Avowant perceiving some Defect in the pleading, distrained again, and so a new Action was brought; in which the Avowant set forth, That Gabriel Metcalf, by Vertue of the said Common Recovery, was seized of the Rent in Fee, as long as Elizabeth and Margaret Clement, or either of them should live, and have Heirs of their, or either of their Bodies respectively; and then avers, That Margaret was alive at the Time of the Distress taken; the Want of which Averment in the first Action was the Occasion of the distraining a second Time; but the Cause was ended by Agreement.

And as to this Matter, the Serjeant seems to insinuate, That there had been no Occasion for bringing this second Action, because in the first there was an implied Averment of the Life of *Margaret* the Tenant in Tail; for 'tis said that 30*l.* of the yearly Rent was *in* * *Arrear* at the Time of the Distress taken; which could not be, if she was dead.

* 2 *Lev.* 88.

So

So in primo, &c. Annæ, A Grantee of a Reverſion created an Eſtate in Tail male, reſerving Rent, and the Defendant in his Avowry for the Rent averred, That there was Iſſue male of the Body of the Grantee living at the Time of the Diſtreſs: Now, tho' there was an Averment of the Iſſue Male then living, yet it was objected that it was not ſufficient, becauſe not certain and particular who it was, which ſhews that an Averment by Implication cannot be good; for the Defendant ought to have averred, That ſuch a Perſon (by Name) was the Son of the Tenant in Tail, and then living; becauſe upon ſuch an incertain Averment as the other, no Iſſue could be taken.

But this Objection was not allowed, becauſe an Eſtate-Tail ſhall be intended to continue till the contrary appear.

Hoole verſus *Bell* & al'.

Winford. Paſ. 8 W. III. Rot. 331.

York, ſſ. REPLEVIN, &c. The Defendant made Cognizance as Bailiff to Robert Knollys, Executor to Francis Knollys; ſetting forth, That the Place where, &c. was Parcel of the Manor of Tinſley, of which the Lord Strafford was ſeized in Fee, who by Deed granted a Rent-charge of 60 l. per Annum, to the ſaid Francis Knollys for Life, to be iſſuing out of the ſaid Manor, with a Clauſe of Diſtreſs.

That Francis Knollys made the ſaid Robert Knollys his Executor, and died; and that he diſtrained for 1020 l. being 17 Years Rent, due in the Life-time of the Teſtator.

Upon Demurrer to this Cognizance the Queſtion was, Whether an Executor of a Tenant for Life was within the Act of 32 H. 8? 32 H. 8. cap. 37.

Serjeant Pemberton, who argued for the Plaintiff, inſiſted that he was not, but only Tenant pur auter vie, during the Life of Ceſtuique vie.

This is all which is ſaid as to this Point, which being very ſhort and dark, I think it may be neceſſary to inform the Reader how the Law ſtood before the making that Statute, and how 'tis now.

ſſ. At Common Law, the Executors of thoſe who were ſeized in Fee or in Tail, or for *Term of Life*, of Rent-Services, *Rent-Charges*, Rents-Seck, or Fee-Farms, had no Remedy to recover *Arrears* of Rents due *in the Life-time of the Teſtator.*

'Tis true, the *Executor* of him who had a Rent *during the Life of another*, might after the Death of the *Ceſtui que vie* haven *Action of Debt* at the Common Law; but he could not *diſtrain.*

This Defect was remedied by that Act, which gave the *Executor* of him who had a Rent for his Life, a double Remedy.

ſſ. An

ſſ. An *Action of Debt* againſt the *immediate Owner* of the Lands at the Time when the Rent was granted, or a Power to *diſtrain* upon the Land charged with the Rent, ſo long as the ſame remained *in his Seiſin or Poſſeſſion*, or of any other Perſon claiming, *&c. from him.*

The laſt Clauſe of the Statute is penned in a different Manner, for there the like Remedy is given to *Executors* of thoſe who had Rents *per autre vie, viz.* An *Action of Debt* againſt the *Owner of the Land himſelf*, who ought to have paid it when firſt due to his Executors, *&c.* and a *Diſtreſs* upon the Land it ſelf, out of which the Rent is iſſuing, in the ſame Manner as if the *Ceſtui que vie* had been then alive; but doth not ſay ſo long as the Lands ſhall remain in the Seiſin or Poſſeſſion of the Grantor, or of any other Perſon claiming, *&c. from him*; all which is left out.

Dyer 375. *a.* About forty Years after the making this Statute, a Queſtion did ariſe upon it, which was thus: *ſſ.* A Man made a Leaſe *for Life*, rendring Rent, and made the Plaintiff his *Executor*, and died ſeized of the Reverſion; the Queſtion was, Whether this *Executor* could *diſtrain?* Or whether an Action of Debt was his proper Remedy for the Rent arrear in the Life time of the Teſtator? And the Reaſon of the Queſtion was, becauſe the Statute did not ſeem to extend to ſuch Rents which were incident to the Reverſion, but only to Rents in Groſs, as *Rent-Charges, &c.* And my Lord *Dyer* was then of Opinion, That tho' thoſe Rents were not mentioned in the Statute, yet a Rent which was incident to the Reverſion was within the Purview and Meaning of it.

* 4 *Rep.* 48. Within ſix Years afterwards there happened the Caſe of * *Andrew Ognel: ſſ.* The Reverſioner in Fee, after the Determination of a Leaſe for 30 Years then in being, granted a *Rent-Charge*, iſſuing out of the Land; and the Term expired.

Then he made a Feoffment in Fee to another, and the Feoffee made a Leaſe at Will.

The Grantee of the Rent died, but the Rent was behind in his Life-time; and his Executor diſtrained for it; and the Queſtion was, Whether the Diſtreſs was lawful? Becauſe the Act ſeems to charge the immediate Owner of the Land at the Time of the Grant made, and all who claim *from him*; but the *Leſſee at Will* did not claim *from the Grantor*, but from the Feoffee; yet it was held, That the Statute muſt be expounded ſo as to extend a Remedy proportionable to the Miſchief; and there can be no Reaſon why the firſt Grantee ſhould be bound, and not the ſecond; and ſo *in infinitum*; for if the Charge was only on the firſt Grantee, becauſe he claimed *from* the Grantor of the Rent; then upon his Alienation, the Remedy given by the Statute is gone, becauſe the Alienee doth not claim *from* the firſt Grantor, and ſo the Statute would be quite evaded.

† 5 *Rep.* 118. *Anno* 1 *Jac. I.* † *Edrich*'s Caſe happened upon the laſt Branch of this very Statute: *ſſ. A.* deviſed a Rent-charge to *B.* for *the Life of C.* and died.

The Heir of *A.* leaſed the Lands to *D.* out of which this Rent-charge was iſſuing, Remainder to *E.* in Fee; the Rent was arrear in the Life-time of *D.* who died; then *C.* the *Ceſtui que vie* died, and *B.* diſtrained *E.* for all the Rent arrear in the Life-time of *D.*

It was objected, That the Diſtreſs was unlawful, becauſe the Statute gave Power to the Executors of thoſe who were ſeized of Rents *for Life*, to diſtrain thoſe *in whoſe Time* the Arrears incurred, and alſo any other Perſon who claimed *from them*, and therefore a Reverſioner or Remainder-Man cannot be diſtrained for Arrears incurred in the Life-time of him who had the Rent for Life, becauſe ſuch a Remainder-Man doth not claim the Land by or *from him*, who was Owner of the Land when the Rent became due.

It was objected likewiſe, That if he could not diſtrain, he had no Remedy by Action of Debt, becauſe that Action was given againſt the *Owner of the Land*, who ought to have paid the Rent when it firſt became due, and againſt his Executors and Adminiſtrators, and not againſt him in Remainder.

But it was adjudged that by the laſt Branch he in Remainder is charged, for that gives a *Diſtreſs* upon the Land, out of which the Rent is iſſuing, in the ſame Manner as if *Ceſtui que vie* was living; therefore he being dead, the Grantee hath Power to diſtrain.

But to proceed in the principal Caſe, There was an Exception to the Cognizance, viz. That it did not ſhew who had the Land when the Rent became due, nor that it was in the Seiſin of him who ought to pay it, or of ſome Perſon who claimed under him; for he ought to purſue the very Words of the Statute which gives the Remedy.

This Exception was not allowed, becauſe if the Lands were not chargeable, it ought to be ſhewed on the other Side; ſo the Defendant had Judgment.

The Serjeant concludes this Caſe with a *Nota* of his own, *viz.* That there might have been another Exception taken to the Cognizance; for this Rent was granted with a Clauſe of Diſtreſs for Non-payment, being lawfully demanded; and the Defendant did not alledge that it was demanded.

But having ſtarted this Exception, he very wiſely tells us, that it would have been to no Purpoſe if it had been made; if ſo, I would fain know to what Purpoſe he mentioned it; for the Law is clear, That if there had been no ſuch Clauſe, the Party might have diſtrained for Rent upon Demand made, and Refuſal to pay it. *Hob.* 208. *Sid.* 117.

Saunders versus *Hussey.*

Tempest. Trin. 8 W. III. Rot. 466.

Wiltshire, ff. IN Replevin the Defendant avowed, &c. for that he was seized of three Acres of Land in the Place where, &c. and so justified the taking, &c. Damage-feasant.

5 H. 7. 28. pl. 11. And upon a Special Demurrer it was objected, That he should have set forth, that the Place where, &c. contained such a Number of Acres, and that he should not have said generally that he was seized.

But this Objection was not allowed.

8 H. 5. 4. pl. 16. He should have set forth of what Estate he was seized in those three Acres; and for this Reason the Court held the Avowry ill, and that it would have been so upon a General Demurrer.

Astill versus *Clarke* & al.

Paſ. 9 W. III. Rot. 367.

Northampton, ff. IN Replevin for taking a Sheep in the High-Street in Daventry.

The Defendant made Cognizance as Bailiff to Daniel Earle of Nottingham, for that the Place where was his Freehold; and so justifies the Taking Damage-feasant.

The Plaintiff pleads in Bar, That before the said Earle had any Thing in the Premisses, Queen Eliz. was seized thereof in Fee in Right of her Dutchy of Lancaster, and by Letters Patent under the Great Seal of England, granted to the Bailiffs, Burgesses and Commonalty of Daventry, &c. two Fairs in every Year, viz. Upon Easter-Tuesday and two Days next following, and the other upon St. Matthias's Day and two Days following, with all the Profits belonging to the said Fairs; by Vertue whereof the said Bailiffs, &c. were seized in Fee of the said Fairs in Right of their Corporation, and that at a Fair held there on Easter-Tuesday, 8 W. III. he bought the said Sheep and paid the Toll, and so was possessed thereof till it was taken away.

This Case is reported in a Method not very intelligible, and therefore it may be necessary to state it, *de novo.*

But first I must take Notice that we are told there were several Arguments at the Bar by the Counsel on both Sides, which are not reported; and the Reason which is given is, That the Chief Justice, upon Consideration of these Arguments, did deliver the Opinion of Court at large.

Now

Now if this will paſs for a good Reaſon, I would fain know why the Arguments of Counſel are at any Time reported; 'tis true, the Opinion of the Court in arguing is of more Authority; but however the Arguments at Bar may inform the Reader, and probably lead him to the right Underſtanding of the Judgment of the Court.

The Queſtion in this Caſe was, Whether the Grant of a Fair under the *Great Seal of England* was good, becauſe the Queen was ſeized of the Manor of *Daventry*, in Right of her *Dutchy of Lancaſter*, and therefore ſhould have paſſed it under the Seal of the Dutchy?

It doth not concern the Queſtion to tell us, that the County-Palatine of *Lancaſter* was erected by *Ed.* III. in the 50th Year of his Reign, in full Parliament; that he granted it to his Son *John of Gaunt* for Life; that he had *Jura regalia*, could pardon Treaſons, Murders, *&c.* That he could make Juſtices in Eyre, and Juſtices of Peace and of the Aſſize; that theſe Royalties were abridged by the Statute 27 *H.* 8. *cap.* 24. by which 'tis enacted, That none but the King ſhall pardon Treaſons, *&c.* or make Juſtices, *&c.*

Neither doth it relate to this Queſtion to ſhew that *John of Gaunt* married *Blanch*, the Daughter and Heireſs of *Henry Duke of Lancaſter*, by whom he had Iſſue *H. IV.* afterwards King of *England*, who was intitled to the *Dutchy* by Deſcent; but being a *King*, he could not have it as a *Duke*, becauſe the Titles are incompatible, for a King cannot have a Dukedom in his own Dominions; ſo that the Liberties and Juriſdiction of the Dutchy were in him as King, and not as Duke; and were by this Means annexed to the Crown.

But he being adviſed that he had a better Title to the Dutchy than he had to the Kingdom; for one he had by Deſcent from his Mother, and the other he claimed from his Father, who was 4th Son of *Ed. III.* which was a very weak Title, becauſe the Right was in the Heir of *Lionel Duke of Clarence*, who was ſecond Son of *Ed. III.*

Therefore in the firſt Year of the Reign of the ſaid *H. IV.* he by Letters Patent, *ex aſſenſu Parliamenti*, ſevered the Dutchy from the Crown; ſo that if he ſhould be deprived of one, he might ſtill enjoy the other to which he had an undoubted Title.

His Son and Succeſſor *H. V.* carried this Matter a little further; for he was not contented to take the Dutchy diſtinct from the Crown, but he by Letters Patent, *ex aſſenſu Parliamenti*, in the third Year of his Reign declared, That all Grants of the Poſſeſſions of the ſaid Dutchy, and not ſealed with the Dutchy Seal ſhould be void.

By the Act of Attainder of *H. VI.* this Dutchy became forfeited, and was veſted in *Ed. IV.* and in his Heirs Kings of *England*, ſeparate from all other Inheritances of the Crown; but by the ſame Act the old Eſtabliſhment was continued, *viz.* That it ſhould ſtill be called the Dutchy of *Lancaſter*, and that the County of *Lancaſter* ſhould be a County Palatine, and that the King and his Heirs ſhould have it as Parcel of the Dutchy; that there ſhould be a *Seal* for the County, and another for the Dutchy; ſo that it ſeems the Dutchy was ſeparated from other Poſſeſſions of the Crown, only in the Manner of conveying ſuch Poſſeſſions; for thoſe may paſs by Let-

ters Patent under the great Seal; but Poſſeſſions held of the Dutchy, and which are not in the County-Palatine, muſt paſs by the Dutchy Seal; which is a Grant by Record, and will paſs a Reverſion without an Attornment; but if the King will make a Feoffment of ſuch Lands, there muſt be a Livery, as in the Caſe of a common Perſon.

1 *Lev.* 28. *Sid.* 189. *Raim.* 90.

Now the Manor of *Daventry* being held of the Dutchy, and being out of the County-Palatine, the chief Queſtion was, Whether the Grant of this Fair ſhall be accounted Part of the Poſſeſſions of the Dutchy, and ſo not paſs but under the Dutchy Seal? And it was adjudged that it ſhall paſs for the Reaſons following.

And firſt there is a great Difference between Prerogatives and Poſſeſſions: Now a *Fair newly created* is a Royal Franchiſe and Prerogative, and cannot be Parcel of the ancient Poſſeſſions of the Dutchy, 'tis not within the Letters of the Statute 3 *H. V.* and it cannot be comprehended within the Meaning of it; for by the Word *Poſſeſſions* in that Act, ſuch only are meant which ſavour of the Land; as Rents, Ways, *&c.* and ſuch Franchiſes were preſerved which were then in being; but this is a Royal Franchiſe created *de novo*, and ſo not within that Act.

Moor 874. 1 *Rol. Abr.* 182. 1 *Brownl.* 182.

The King being ſeized of an Advowſon in the Right of the Dutchy, granted the next Preſentation under the Great Seal; this was held good; for 'tis not Parcel of the *Poſſeſſions* of the Dutchy, but as a Fruit fallen from it; 'tis no more than a Recommendation to a Biſhop, which might be done by Parol; and ſo no Neceſſity either of the Great Seal or Dutchy Seal.

Moor 159. 2 *Leon.* 150, 162.

And now we are told that the Caſe of *Saffron Walden*, as to this Purpoſe, is worth all the reſt, which is all that is mentioned concerning that Caſe; it was thus, *ff. H.* 8. being ſeized of that Manor, Parcel of the Dutchy, granted to a Corporation of Prieſts, two Mills, one Market, and the Clerkſhip thereof, in Fee-Farm, rendring to himſelf and his Succeſſors 10 *l. per Annum.*

The Mills were Parcel of that Manor, and the Market was held there by Preſcription.

Afterwards he granted the ſaid Manor and Rent to the Lord *Audley* in Fee.

By the Diſſolution of *Chantries*, the Mills and the Market were veſted in *Ed. VI.* but in the Act there is a ſaving of the Rent to the Lord *Audley* and that King; and he reciting the Grant made by his Father *H. VIII.* did further grant the Premiſſes and a *Fair* to the Corporation of the Vill of *Walden* in Fee-Farm, reſerving to himſelf, his Heirs and Succeſſors, *vel* to the chief Lord of the Fee, the yearly Rent of 10 *l. & non ultra.*

A *Sci. fa.* iſſued out of the Exchequer againſt this Corporation for this laſt 10 *l.* Rent, who pleaded that they paid it yearly to the Lord *Audley* and his Heirs.

And upon Demurrer to this Plea it was argued, that the Grant under the Great Seal by *H. VIII.* was void, becauſe the Rent reſerved out of the Inheritance of the Dutchy muſt be taken as Parcel of the *Poſſeſſion* thereof; for it partakes of the ſame Nature and Quality of the Lands it ſelf, out of which it iſſues.

Now King *H. IV.* having ſeparated the Poſſeſſions of the Dutchy from thoſe of the Crown, they muſt from thence be governed not by the Prerogative, as his own Lands are, and ſo paſs by Letters Patent under the Great Seal, but by the ſame Rules and Methods as the Dutchy Lands paſſed before the Union; and that was under the Dutchy Seal.

But it was reſolved that this was a Rent in Groſs, held of *H. VIII. in Jure Coronæ*, and not Parcel of the *Poſſeſſions* of the Dutchy, nor of the Manor of *Walden*; for a Rent cannot be Parcel of a Manor, unleſs by Preſcription, or a Rent-Service: Now this Rent cannot be by Preſcription, becauſe 'tis newly created; and it cannot be a Rent-Service, becauſe that is where Lands are holden by doing ſome corporal Service; as Fealty, *&c.*

And ſince the Statute *Quia emptores terrarum*, a Subject cannot make a Feoffment of Lands to be held of himſelf by Rents and Services, for that would be to create a Tenure in himſelf, which is expreſly prohibited by that Statute; and therefore ſuch Feoffee muſt hold it of that very Lord of whom it was held before.

So that if the Duke of *Lancaſter* had made this Grant, and reſerved this Rent, it would not have been a Rent-Service, and ſo Parcel of the Manor, for that would be to make a Tenure in himſelf; therefore it muſt be a Rent in Groſs, and held of his Perſon; and ſo it is of the Perſon of the King; and therefore cannot paſs under the Dutchy Seal, but under the Great Seal of *England*.

Dixon verſus *James*.

FH
MVSEVM
BRITANNICVM

Cooke. Mich. 9 W. III. Rot. 1431.

Lincoln, ff. IN Replevin for taking his Cattle in the Moor.

The Defendant avowed, That Anne Bouchert was ſeized in Fee of a Meſſuage and 100 Acres of Land in Nothwillingham, and ſo preſcribes to have Common appurtenant to the ſaid Tenements in the Place called the Moor; then he ſets forth, That the ſaid Anne Bouchert leaſed the Premiſſes to the Defendant, and ſo juſtifies the Taking, &c. Damage-feaſant.

The Plaintiff replied, That George Heneage was ſeized in Fee of a Meſſuage and two Acres of Paſture in Northwillingham, and likewiſe preſcribed for Common appurtenant in the Moor; that the ſaid Heneage demiſed the Meſſuage to the Plaintiff, and thereupon he put in his Cattle.

The Defendant rejoined, that the Plaintiff, under the Pretence of uſing the Common, had ſurcharged it; and thereupon he took his Cattle Damage-feaſant.

The Plaintiff took Iſſue upon the Surcharge, and there was a Verdict againſt him.

And it was objected in Arreſt of Judgment, that this was an immaterial Iſſue, becauſe one Commonet cannot diſtrain the Cattle of anothet; though he might diſtrain thoſe of a meer Stranger, who had no Pretence to any Right of Common.

There are ſome Books cited, and then we are told, that thereupon (I ſuppoſe 'tis meant upon the Authorities cited) the Judgment was arreſted niſi cauſa; and that after this Rule was made, the Caſe was argued again, but to no Purpoſe, for that Rule was not diſcharged.

Before I mention the Caſes cited, I think it neceſſary to take Notice of the Writ *de admenſuratione paſturæ*, which properly lies for one Commoner againſt another who hath ſurcharged the Common; and this is to bring it to an Equality or Proportion, according to the ſeveral Freeholders to which the Common doth belong.

22 *Aſſize. pl.* 65. Now in the firſt Book cited, *viz.* in 22 *Aſſize*, all the Judges held, That ſuch a Writ would not lie by one Commoner againſt another, who had *Common appendant or ſans number*, but only againſt him who had *Common Appurtenant*, and to a certain Number; and that in ſuch Caſe, he who brings the Writ, muſt ſhew the certain Number, and then ſet forth, That the other put in *ultra* that Number, which is all we can learn from this Caſe.

2 *Cro.* 195. *Yelv.* 105. idem. Then as to the Caſe of *Hoddeſdon* and *Grevill*, it was Treſpaſs brought by the Lord againſt his Tenant, who had a Common by Preſcription; and the Lord's Conies being there Damage-Feaſant, the Commoner entered to *chaſe them*, as 'tis in *Croke*, but 'tis to *chaſe* and *kill them* in *Yelverton*; and it was adjudged, That the Commoner had nothing to do with the Land but to put in his Cattle.

Now doth it follow, that becauſe he who brings the Writ *de admenſuratione Paſturæ* againſt his Fellow Commoner, muſt ſhew how many Commons he hath, and that he puts in *ultra* that Number; or that becauſe a Commoner cannot kill the Lord's Conies, which damnifie his Common, that therefore he cannot diſtrain the Cattle of another Commoner *ſurcharging* the Common?

Style 428. The Caſe of *Brong* and *Moor* is cited, which is nothing to the Purpoſe; it was a Motion made by Mr. Sollicitor, in Arreſt of Judgment, in Replevin, and the Exception to the Avowry was: *ſſ.* That he did not ſhew that he was *damnified* by the Cattle diſtrained, for it might be, that there was ſufficient Common beſides.

Now it doth not appear in that Caſe, Whether the Cattle diſtrained, were belonging to a Stranger or to another Commoner; but I rather think they were the Cattle of a Stranger, becauſe my Lord *Rolle*, in anſwering that Exception ſaith, That a Commoner may diſtrain the Cattle of a *Stranger* Damage Feaſant in the Common, and that 'tis not neceſſary for him to alledge that he was damnified by them; he ought only to ſhew that he hath a Title to the Common, that ſo it may appear he had an Authority to remove the Nuſance.

He who would collect the Subſtance of that Caſe, and apply it to this, muſt thus argue. *ſſ.* If a Commoner diſtrain the Cattle of

a *Stranger*, Damage Feasant on the Common, he need not shew that he was damnified in particular, but he must set forth his Title to the Common; *ergo* one Commoner cannot distrain the Cattle of his Fellow Commoner for surcharging the Common: I think there is neither Law nor Logick in this Application.

We are told, that 46 *Ed.* 3. was cited on the other Side, but the Page is not mentioned, and there being many Cases in that Year, it was not easily found, but 'tis in *folio* 12. *plac.* 13. 'tis a very short Case, and no Judgment in it, and 'tis likewise imperfect; but 'tis thus, *ff.* A *Recordare* was brought (I suppose) to remove a Replevin out of the County Court, for taking the Cattle in *B.* though no Place is named.

The Defendant avowed the taking in another Place, and sets forth, That the Plaintiff had Common there for so many Beasts, and that he put in more than he ought; and those he took Damage Feasant.

My Lord *Brook* in * abridging that Case, saith, That the Defendant avowed for that the Plaintiff had Common (but doth not say where) for twenty Cattle, and that he put in twenty four; and so he distrained *the four* Damage Feasant. * Tit. Abridg. 77. pl. 29.

But the Avowry being general, it doth not appear whether the Defendant was a *Commoner* or Owner of the Soil; and if he was not a *Commoner*, that Case also is very little to the Purpose.

Simpson versus *Tellwright* & al'.

Tempest. Hill. 11 W. III. Rot. 316.

Stafford, ff. REPLEVIN for taking a Gelding in the Delphfield.

The Defendant made Cognizance as Bailiff to Jane Ball, setting forth, That the Place where, contained ten Acres in Tunstall, of which the said Jane was seized in Fee, and so justifies the taking Damage Feasant.

The Plaintiff in Bar to the Avowry, sets forth, That before the said Jane had any Title, one Robert Sneyd was seized in Fee of two Thirds of the said Manor of Tunstall, of which the Delph-field, and a Close called the Lime-field, were Parcel; and that Time out of Mind, there had been a Coal-Mine in the Lime-field.

That the said Robert Sneyd demised a Moiety of the Coal-Mine, to one Burflew, for Ninety nine Years, with free Ingress, &c. to the said Mine, &c.

That the said Term and Estate was vested in one Colclough, who devised a sixth Part to Aaron Wedgwood.

That the Plaintiff bought Coals of the said Wedgwood, who gave him leave to carry them from the Mine, through an unusual Way through the Delph-field leading to the Highway; and avers, That it was the usual and convenient Way; and that as he was passing

passing in the said Way through Delph-field, and carrying his Coals, the Defendant took the Gelding, &c.

The Defendant confessed the Demise to Burslew, but saith, That at that Time the Delph-field was Copyhold, held of the Manor of Tunstall; that before the Demise, one William Sneyd made a Feoffment of the said Manor, &c. and afterwards made another Feoffment of the Delph-field, to one Tellwright; by which the Copyhold was merged, and so from him derives a Title to Jane Ball.

And farther saith, That at the Time of the Demise to Burslew, or at any Time before, there was not any Coal-Mine open in the Lime-field, nor any Way from the said Field leading to the Highway through the Delph-field.

And upon Demurrer, those who were for the Defendant objected, That the Owners of the Coal-Mine in the Lime-field, could not have a Way through the Delph-field; because when the said Mine was first leased to Burslew by the Lord of the Manor, the Delph-field was Copyhold, and the Owner thereof was a Copyholder of the Inheritance; and though the Lord had granted a Way through the Delph-field, by the express Words of the Lease to Burslew, yet it was more than he could do, for he had no Power to grant any Way over the Lands of such a Copyholder.

Besides, it doth not appear that a Way through the Delph-field was absolutely necessary: 'Tis true, the Plaintiff hath alledged that it was an usual Way, but it doth not follow from thence that it must be necessary, or that there was no other Way at the Time of the Demise; if there was, 'tis more reasonable that it should be there then through the Lands of a Copyholder; especially since at that Time there was no Mine open in the Lime-field, nor any Way there; so that if this Way through the Delph-field is not of absolute necessity, the Lessee of the Coal-Mine shall not have it.

Sid. 39, 111. To this Purpose the Case of Parker and Welsted was cited. fl: A Man had three Parcels of Land, and the usual Way to the third, was over the other two: he sold them all to W. who sold the two Closes to N. without reserving the Way to the third; and in an Action of Trespass, &c. the Jury found there was no other Way to the third Close; and for that Reason it was adjudged, that W. should have the Way, because 'tis an Injury to the Publick, that a Close should lie fresh for want of a Way to it.

Therefore it not appearing in the principal Case, but that there might be another Way to the Lime-field, and not through the Delph-field, there could be no absolute necessity for a Way there; and for this Reason the Court inclined against the Plaintiff.

But then it was moved, That when the Copyholder had purchased the Fee-simple, his Copyhold was extinct; and in such Case the Grant of the Way in that Lease of the Coal-Mine, will operate as well as if the Delph-field had been in the actual Possession of the Lord of the Manor, at the Time of the Lease made; and upon this Point the Case was adjourned for a farther Argument, but it was never stirred again, for the Parties agreed.

But it cannot be ill for those Reasons; for as to the first, where an Estate passes by Transmutation of Possession, as it doth by a Feoffment, there the Consideration is not material; for the Feoffor may give it to whom he will without any Consideration: 'Tis true, in Bargains and Sales, and Covenants to stand seized, the Law is otherwise; for by those Conveyances nothing will pass without a Consideration expressed or implied, or supplied by an Averment and Proof; but in Feoffments the Will of the Feoffor guides the Equity of the Estate without any Manner of Consideration.

In the next Place, It cannot be ill for omitting the Words *to the Use* of them and their Heirs; for where a Feoffment is made *habendum* to the Feoffee and his Heirs, tho' no Use is expressed, yet an Use will arise upon the Livery and Seisin, and shall then be guided by the Law.

Rescous.

Sharpe versus *Bechenowe*.

Winford. Trin. 3 Jac. II. Rot. 1810 & 1811.

Norfolk, ff. RESCOUS, &c. for that the Plaintiff had diſtrained three hundred Sheep, and would have impounded them for Damage Feaſant, and the Defendants reſcued them; then he farther ſets forth, That they broke his Cloſe at Netiſheard, and chaſed his Cattle, &c.

The Defendants plead, That Anthony, Biſhop of Norwich, was ſeized in Fee of the Manor of Netiſheard, and that the ſaid nuper Epiſcopus and his Predeceſſors, Time out of Mind, had libertatem faldagii, and a Fold-courſe for three hundred Sheep, in and upon the Plaintiff's Cloſes at certain Times in the Year.

That the ſaid Biſhop demiſed the ſaid Faldage and Fold-courſe, to Thomas Townſend for twenty one Years, under which Leaſe the Defendants juſtifie the putting in the Sheep; and that they were depaſturing there 'till taken by the Plaintiff, who would have impounded them, but the ſaid Defendants hindered him, and kept the Sheep upon the Cloſes aforeſaid utendo libertate faldagii, Feeding, Paſture, and the Fold-courſe aforeſaid.

The Plaintiff replies, That the Cloſes before-mentioned were Copyhold and Parcel of the Manor of Netiſheard; and that the ſaid nuper Epiſcopus, being ſeized thereof in Right of his Biſhoprick, did, before the Leaſe made by him to Townſend, grant the ſaid Cloſes by Copy of Court-Roll to the Plaintiff and his Heirs, by Vertue whereof he entered, &c. then traverſes the Preſcription for Liberty of Faldage and Fold-courſe.

The Defendants rejoin, and take Iſſue upon the Traverſe, and they had a Verdict.

And now it was moved in Arreſt of Judgment.

1. It was ſaid, That Anthony Biſhop of Norwich, was ſeized of the Manor, &c. which could not be at that Time; becauſe 'tis after-

afterwards alledged, That the ſaid nuper Epiſcopus had Liberty of Faldage, which Word nuper implies that he was either dead, or tranſlated, or at leaſt that he was not Biſhop at that Time, and ſo it was adjudged upon the ſecond Exception in the Biſhop of * Salisbury's Caſe. * 10 Rep. 59. B.

In anſwer to which, though 'tis true that the Adverb nuper, imports, That the Biſhop is either dead or removed; yet it doth not appear that it was before, but rather after the Treſpaſs, becauſe the Plea is, That by Vertue of the Demiſe, &c. he was poſſeſſed of the Liberty of Faldage at the Time of the ſuppoſed Treſpaſs; and by Reaſon thereof ought to have the Paſturage; which may ſerve for an Averment that the Biſhop was then living, &c.

As in *Dyer*, an Ejectment was brought for a *Rectory*, wherein the Plaintiff ſet forth, That he was *Rector Eccleſiæ, &c. & adhuc ſeiſitus exiſtit de rectoria*, theſe laſt Words were a ſufficient Implication, that the Parſon was living. *Dyer* 304. pl. 52.

So in Ejectment, the Plaintiff declared upon a Leaſe for five Years, if the Lady *Morley ſo long lived*, and that the Defendant entered, and ejected him *termino ſuo præd' nondum finito*, which Words imply, that the Lady *Morley* was living; for if ſhe had been dead, the Term could not be in Being. 2 *Cro.* 622. 1 *Rol. Rep.* 50. 2 *Bulſt.* 67, 263.

Beſides, if he had been Biſhop at that Time, this Leaſe is void againſt the Succeſſor, becauſe there was no Rent reſerved.

To prove this *Pennant*'s Caſe was cited, which the Reader may peruſe, and ſee whether he can find any Thing relating to it, for I cannot. 3 *Rep.* 65.

The next Caſe cited, is between *Bowles* and *Walter*. *ſſ.* Tenant in Tail of a Manor, to which an Advowſon was appendant, grants the next Avoidance and died; the Iſſue in Tail may avoid this Grant, becauſe 'tis only of a Chattel, and no Rent is reſerved upon it. 1 *Rol. Rep.* 190.

2. That the Preſcription to have Faldage cannot extend to depaſturing the Sheep, becauſe the Nature of Faldage is only to have the Sheep (but not my own) folded on my Lands in the Night-time. Spelm. Gloſſ. 210. and not in 248.

'Tis true, he hath preſcribed likewiſe for a *Fold-courſe*, which is a Sheep-Walk, or Feeding for Sheep; but this we are told is inconſiſtent with *Faldage*; for that is a Liberty to have another Man's Sheep folded on my Land, and a *Fold-courſe* is to have Paſture for a certain Number of my own Sheep upon another Man's Land. 2 *Vent.* 139.

It was alſo inſiſted, That Judgment ought to be for the Plaintiff, becauſe the Defendants had confeſſed the Treſpaſs, and had not made a good Juſtification, and thereupon the Judgment was ſtayed.

Alwayes

Alwayes verſus *Broome* & al'.

Trin. 7 W. III. Rot. 821.

Suffolk ſſ. RESCOUS, &c. for that the Plaintiff had diſtrained five Hogs, doing him Damage upon five Acres in Snape, and would have pounded them, and had actually put one into the Pound; but the other were reſcued by the Defendants, who broke the Pound and took the Hog away.

Davis, one of the Defendants, pleads Not guilty; and thereupon Iſſue was joined; Broome, the other Defendant, likewiſe pleads Not guilty as to the breaking the Pound, and there was an Iſſue upon that; and as to the taking the Hogs, he pleads in Bar, &c. quia dicit they were taken in Homemarſh, which is his Freehold, and ſo juſtifies the taking from the Plaintiff, &c. quæ eſt eadem captio, &c.

The Plaintiff replied, That he was ſeized in Fee of a Cloſe called the Liſt, which contained the five Acres mentioned in his Declaration; and that he took the Hogs there Damage Feaſant, and would have pounded them, &c. and traverſed that he took them in Homemarſh.

The Defendant rejoins, and as to the Reſcous of the four Hogs, ſuppoſed to be doing Damage in the Liſt, and as to the taking the other Hog out of the Pound, he pleads, That after the Taking, &c. and before the Reſcous, he tendered 10 s. which was ſufficient Amends: And upon Demurrer,

1. It was objected againſt the Bar, for that there were two Defendants, and one of them pleads the General Iſſue to the whole, and the other likewiſe pleads the ſame Plea as to Part, and as to the Reſidue dicit, which is incertain; for there being two Defendants, it doth not appear which of them dicit.

But this was held to be a very frivolous Exception, for the Word dicit muſt have relation ad proximum antecedens in a plain grammatical Conſtruction; and it can be no other than he who before had ſaid, That he was not guilty of breaking the Pound.

2. It was objected, That the Defendant had alledged the Place where to be his Freehold, but in his Rejoinder he pleads a Tender of Amends, which is a Departure; for there can be no Occaſion of tendering Amends, if the Hogs were on his own Ground.

To which it was anſwered and ſo adjudged, That it was not a Departure, for the Tender was pleaded to the Treſpaſs done in the Liſt, being the Place newly aſſigned in the Replication, and not mentioned before; ſo that 'tis no more than a new Bar to the new Aſſignment.

But then one of the Judges objected, That the Plaintiff had declared, that he impounded one of the Hogs, and the Defendant alledged,

ledged, That they were all in the Poſſeſſion of the Plaintiff, and that then Amends was tendered for the Treſpaſs of all; but did not traverſe that one was in the Pound, for if that was true, then the Tender for the Treſpaſs done by that Hog, was too late; and though the Defendant had pleaded Not guilty as to the Pound-Breach, yet that will not help, for the Doors of the Pound might be open, and in ſuch Caſe 'tis lawful to take the Hogs; and upon this Objection the Caſe was adjourned.

It was ſtirred again, and then an Exception was taken to the Writ, which was partly for a Reſcous, and partly for a Pound-Breach, which are diſtinct Writs in the Regiſter, and the Forms ought to be purſued, eſpecially in an Action of Treſpaſs as this is; but notwithſtanding this Objection, the Plaintiff had Judgment.

Scire facias.

Jane Sudall Adminiſtratrix *of Tho' Sudall*, verſus *Wytham.*

Belvin. Paſ. 2 Jac. II. Rot. 684.

London, ſſ. SCI. fa. brought by the Adminiſtratrix, Quare executionem non habeat, for 624 l. Debt, and 5 l. Damages, upon a Judgment obtained by her Inteſtate, and that 587 l. was ſtill due and unpaid.

The Defendant pleads in Bar, That within one Year after the Judgment obtained, and after 42 l. Parcel of the ſaid Debt of 624 l. by Vertue of a Teſtatum Fi. fa. directed to the Sheriff of Yorkſhire, and nulla alia bona returned; there was a Ca. ſa. iſſued out againſt the Defendant, and that he was taken in Execution in Yorſhire, and removed from thence by Habeas Corpus and committed to the Fleet, and the Warden voluntarily ſuffered him to eſcape; and upon Demurrer it was argued, That notwithſtanding this Diſcharge by the Gaoler, yet the Debt remained, and the Defendant might be retaken by a new Execution; and ſo it was held in 1 Mod. 194. and in *Allanſan and Butcher's Caſe, Sid. 330.

* 1 Lev. 211. In which laſt Caſe this Diſtinction was made, That if a Man in Execution eſcape by *Negligence*, he may be retaken either by the Sheriff or the Plaintiff; but if 'tis a willful Eſcape, by the *Conſent of the Sheriff* himſelf, he ſhall never retake him, but the Plaintiff may; and the Reaſon is, becauſe otherwiſe by the Contrivance or Inſufficiency of the Gaoler the Plaintiff ſhall be without any Remedy.

This Caſe was adjudged, *Anno* 19 *Car.* 2. in B. R. and yet but the very next Year the Court of *C. B.* was divided upon this very Point in the Caſe of *Crane* and *King*, *Paſ.* 20 *Car.* 2. *Rot.* 865. but ſince it hath been ruled, That the Perſon who makes a *voluntary* Eſcape may be retaken by the Party, becauſe he hath an Intereſt in the Body till the Debt is ſatisfied, or he may have a *Sci. fa.* againſt him, *quare executionem habere non debet*; for it would be a very great Miſchief that a Gaoler might at his Pleaſure ſuffer a Priſoner to eſcape, and put the Plaintiff

Plaintiff to an Action againſt him, who might be inſufficient to anſwer the Debt.

'Tis true, the Law was held otherwiſe formerly, that even in the Caſe of a voluntary Eſcape, if the Debtor was retaken, he might diſcharge himſelf by an *Audita querela* brought by him againſt his very Creditor, becauſe they held, that upon an Eſcape the Execution was diſcharged; and if ſo, the retaking might be unlawful; the Remedy was only againſt the Gaoler, but the Law is now otherwiſe, for the Reaſon above-mentioned. 1 *Leon.* 78. 2 *Leon.* 96. *Hob.* 202.

But then there was an Exception taken to the Scire facias, viz. That it was brought by an Adminiſtratrix to Thomas Sudall, by Vertue of an Adminiſtration out of the Prerogative Court; and doth not ſay, That the Inteſtate had bona notabilia as ſhe ought to have to intitle that Court to grant it.

But this was diſallowed, for if he had not bona notabilia, the Adminiſtration is not void, but only voidable.

Corbet verſus *Lord Carlingford* & Ux'.

Winford. Hill. 2 & 3 Jac. Rot. 381.

Midd. ff. SCIRE facias by Edward Corbet, upon a Judgment in Ejectment, recovered by him againſt Humphrey Weld, upon the Demiſe of William Atwood; and it was brought againſt the Lord Carlingford and his Lady, after the Death of the ſaid Weld the Defendant in the Ejectment; and upon Demurrer to the Scire facias, the Plaintiff had Judgment.

The Queſtion was, 1. Whether a *Scire facias* would lie by a Leſſee in Ejectment, who had no real Intereſt in the Land, but was only nominal? Or whether it ought to be brought by *Atwood* himſelf, who was the Leſſor of the Plaintiff?

2. If it would lie by the Leſſee, then, Whether it could be brought againſt thoſe who were Strangers to the Judgment? For that was for what was obtained againſt *Weld*, and not againſt the Lord *Carlingford*, who only entered into the Land after the Death of *Weld*; and therefore it was ſaid, that the *Scire facias* ought to be brought againſt the Heir of *Weld*.

But it was adjudged, That it was well brought by the Leſſee, and ſo ruled formerly, *viz.* That it might be brought by the Adminiſtrator of the Leſſee in Ejectment, or by the Leſſor himſelf; for either of them may bring a Writ of Error on ſuch a Judgment, and if ſo, either of them may have a *Scire facias*.

It was alſo held, That it might be brought againſt the Defendant, although he was a *Stranger* to the Judgment, and ſo adjudged formerly, that it would lie againſt the Defendant; and the Ter-Tenants, who were meer Strangers to the Judgment, and likewiſe againſt *Sid.* 317. *Sid.* 317.

3 *Lev.* 100. gainſt the Executors of the Defendant, and a Stranger who had entered after his Death; which was this very Caſe.

Sparks verſus *Cole.*

Winford. Mich. 3 Jac. II. Rot. 324.

Midd. ff. SCIRE facias againſt Cole, who entered into a Recognizance before a Judge as Bail for one Harris, at the Suit of Sparks, who obtained Judgment againſt the ſaid Harris for 46 l. and that he did not pay the Money, nor render his Body to Priſon.

Cole the Defendant pleads in Bar, That after the Judgment, there was a Ca. ſa. iſſued againſt the ſaid Harris, directed to the Sheriffs of London, who returned non eſt inventus, and thereupon a Teſtatum Ca. ſa. was awarded againſt him, directed to the Sheriff of Surrey, upon which he was taken in Execution, and detained until the Plaintiff himſelf required the Sheriff to let him go.

The Plaintiff replied, That no ſuch Writ of Capias iſſued.

The Defendant rejoined that ſuch a Writ did iſſue, and that Harris was taken in Execution upon it; and ſo concludes to the Country, and upon Demurrer the Plaintiff had Judgment; for when he replied that there was no ſuch Writ iſſued, and the Defendant in his Rejoinder affirmed, That ſuch a Writ did iſſue, this was a direct Negative and Affirmative, and thereupon he ſhould have offered an Iſſue, and not have jumbled ſuperfluous Matter of Fact and Record with it; and that Harris was taken in Execution, and ſo conclude to the Country as to both.

'Tis true, the Plaintiff in his Replication, might have traverſed, That a Capias did iſſue againſt the Principal, without any Inducement to it, becauſe the Bail himſelf had confeſſed it in his Plea; and that non eſt inventus was returned upon it.

But it might have been a Queſtion, Whether ſuch a Traverſe had been good, if the Defendant, who was the Bail, had confeſſed but one Capias againſt the Principal, and that he was taken upon it.

For though 'tis not abſolutely neceſſary when a Scire facias is brought againſt the Bail, to ſhew that a Capias iſſued againſt the Principal; yet when 'tis confeſſed by the Bail, and in his Plea he ſheweth, that what was done upon it, might be a Bar to a Sci. fa. brought againſt him; 'tis very requiſite that the Plaintiff ſhould plead That one Ca. ſa. did iſſue againſt the Principal, and ſhew when, and that non eſt inventus was returned, and then traverſe, that no ſuch Ca. ſa. iſſued as alledged by the Defendant, and that upon ſuch Ca. ſa. the Principal was not taken in Execution; for 'tis plain there muſt be a Ca. ſa. againſt him, and non eſt inventus returned before there can be a Scire facias againſt the Bail.

Lastly, 'Tis impertinent to plead that Harris was taken and continued in Execution until discharged by the Order of the Plaintiff; for if once he was in Execution, the Bail are discharged.

Gubbs versus *Backwell.*

Tempest. Hill. 3 & 4 Jac. II. Rot. 376.

London, ff. SCI. fa. against the Executors of Alderman Backwell, upon a Judgment obtained against the Testator.

The Defendant pleads, That his Testator was a Trader, and indebted to several Persons, particularly named, who petitioned the Lord Keeper for a Commission of Bankrupcy against him; and thereupon a Commission was granted, &c. which he averred to be still depending: And upon Demurrer it was objected to the Plea, That the Defendant had not alledged that his Testator was a Bankrupt at the Time of the Petition exhibited to the Lord Keeper, or at the Time when the Commission issued forth; and this was held to be a material Exception; for by the Statute 13 Eliz. a Bankrupt is described, and then Power is given to the Lord Chancellour to grant Commissions against such Persons being Bankrupts; and so are all the Precedents in his first Book; 13 Eliz. cap. 7.

But names none; 'tis true, in 452 & 472, 'tis said, at the Petition of the Creditors against their Debtors, *tunc existen' decoctores*; which are all the Precedents I can find.

Baxter versus *Peach.*

Cooke. Trin. 4 Jac. II. Rot. 1711.

Midd. ff. SCI. fa. upon a Recognizance taken before a Judge against the Defendant, who was Bail for one Henry Oliver, at the Suit of Nicholas Baxter, the now Plaintiff, setting forth, That he, as Administrator to Mary Moorey, had obtained Judgment for 48l. against the said Oliver; but he had not paid the said Money, or rendered his Body to Prison; and therefore this Action was brought against the Bail, to shew Cause why the Money

ney de Terris & Catallis of the Defendant fieri & levari; (but non debet was left out) and upon non eſt inventus retorned, there was another Sci. fa. and the like Return.

The Defendant craved Oyer of the Writs and of the Recognizance, and then demurred; and theſe Exceptions were taken to the Sci. fa. viz.

1. That 'tis not alledged that there was a Capias againſt the Principal; and it was held, That it was of Neceſſity to be recited in the Sci. fa. but the Bail himſelf ought to ſhew that there was no Capias againſt the Principal.

Cro. Eliz. 597. Moor 433. *idem.* 2 Cro. 97.

2. That there was a Variance between the Recognizance and Record; for the Defendant became Bail for Oliver, at the Suit of Nicholas Baxter, which muſt be brought againſt him in his own Right; but the Suit upon which the Judgment was obtained was by him, as Adminiſtrator to Mary Moorey, and ſo not the ſame Action to which the Defendant became Bail.

But this was diſallowed; for 'tis the uſual Practice to take Bail upon a Clauſum fregit, and to declare in Debt.

The Serjeant hath concluded this Caſe with a *Nota* of his own, That there was a Fault in the *Sci. fa.* becauſe it was to ſhew Cauſe why Execution *de Terris & Catallis, &c. fieri & levari*; but the Words *non debet* were omitted; and for this he cited 3 *Keb.* 196. where the Court held it to be ill; but I cannot anſwer for the Authority of that Book, the Caſes are very dark, and not intelligible.

But be it as it will, I think it is not a very material Exception; for tho' the Words *non debet* do not come in ſo ſoon as the Serjeant would have them, yet they come in ſoon enough to make the Sentence compleat and very intelligible; for the *Sci. fa.* is brought againſt two Defendants, *viz.* That one ſhould ſhew Cauſe why the Money *de Terris & Catallis fieri & levari*, and the other alſo ſhould ſhew Cauſe why the Money ſhould not be levied, *&c. Et præfat'* the Plaintiff *reddi non debeant*; which Words go to the entire Sentence, which is joined by the Copulative *Et*.

Redman

Redman versus *Idle* Executrix & al'

Winford. Mich. 10 W. III. Rot. 366.

Midd. ff. Sci. fa. directed to the Sheriffs of Middlesex; the Case upon the Pleadings was thus: ff. Michael Idle and Roger Wise became Bail before a Commissioner in Yorkshire, together with John Shepley the Defendant in the principal Action, at the Suit of the Plaintiff; the Recognizance was transmitted to a Judge of the Common Pleas, and it was made a Record of that Court; and afterwards the Plaintiff Redman obtained Judgment against Shepley for 200l. but he had not paid the Money, or rendered his Body to Prison; and that Michael Idle was dead, and so this Sci. fa. was brought against his Executrix and the other Bail, &c. and after another Sci. fa. and two Nihils returned, there was Judgment by Default against Wise, one of the Bail, and the Defendant Shepley.

The Executrix protestando that she had fully administred, and that she had not Assets, &c. pleaded in Abatement, that the Sci. fa. ought to be brought in Yorkshire and not in Middlesex; and thereupon the Plaintiff, after two Imparlances, demurred, and had Judgment, that the Defendant should answer over.

Then she pleaded in Bar, That there was not any Ca. sa. against the Principal, before the first Sci. fa.

To which the Plaintiff replied, That after he had obtained Judgment in the original Action, and before the first Sci. fa. was brought against the Bail, he did prosecute a Ca. sa. against the Defendant Shepley, returnable Crastino Trin. upon which the Sheriff returned Non est inventus.

The Defendant protestando that the Replication was insufficient, rejoined and pleaded, That the Ca. sa. was delivered to the Sheriff of Yorkshire after Crastino Trin. and after the first Sci. fa. issued forth; and that the Plaintiff by Fraud between him and the Sheriff had procured the first Sci. fa. to be returned Non est inventus; and then traversed the Delivery of the Ca. sa. to the Sheriff before the Return; and upon Demurrer these Points were resolved.

1. That a Sci. fa. may be brought in Middlesex upon a Recognizance taken in Yorkshire; for tho' 'tis a Record as soon as 'tis acknowledged, yet 'tis not compleat till 'tis enroll'd in Court; and therefore both these Acts concurring to make it a perfect Record, the Sci. fa. may be brought in either County. Hob. 195. Aleyn 12. Brook Lieu 36, 85, 88.

2. That the Traverse of the Time of the Delivery of the Ca. sa. to the Sheriff was not material; for if the Writ is actually out, the Sheriff may lawfully make a Warrant, tho' 'tis not come to his Hands; and it shall be intended that it was delivered to him before the Arrest.

And to prove this the Case of *Green* and *Jones* was cited. It was an Action of Battery; the Defendant justified by Vertue of a Bill of *Middlesex*, *prosecuted* out of the Court of *B. R.* against the Plaintiff, retornable *tres Mich.* directed to the Sheriffs of *London* and *Middlesex*; upon which a Writ was made to the Defendant *Jones* to arrest the Plaintiff, by Vertue whereof he was arrested before the Return of the Writ, *&c.* And upon Demurrer it was objected, That the Defendant had not pleaded that the Writ was deliver'd to the Sheriff, *as the usual Form is*; but it was disallowed for the Reason before-mentioned.

Now because every Reader may not at first apprehend what this usual Form is, I thought it necessary to add, That 'tis usual to alledge in such a Plea that the Writ was delivered to the Sheriff before the Arrest.

Slander.

Slander.

THE Declarations under this Title are very long, because the Words are laid several Ways; and if any of them are proved which are actionable, the Plaintiff must have a Verdict.

And because the Case it self is no more than, Whether such Words for which the Plaintiff declared are actionable or not, I have only set down what the Words are.

Pepper versus *Gay*.

Winford. Trin. 5 W. III.

Norwich, ff. SLANDER brought by a Doctor of the Civil Law, a Justice of Peace, and Chancellor to the Bishop of Norwich, for these Words. ff. He is not fit to be a Chancellor or a Justice of Peace; He is a Knave, a Rascal and Villain, he is not fit to practise, he ought to have his Gown pulled over his Ears.

Upon Not guilty pleaded, the Plaintiff had a Verdict, and Damages to 40 l. and Judgment affirmed.

There are many Cases where Words spoken of a *Justice of Peace* are actionable; I shall only instance two, which I think are applicable to the principal Case: ff. * Hamond *is a debauch'd Man, and not fit to be a Justice of Peace.*

† The other is reported in several Books, but the Words are, *Thou art a forsworn Justice, and not fit to sit on the Bench.*

* *Style* 22. 210.

† 1 *Mod.* 22. *Sid.* 432. 1 *Lev.* 208. 1 *Vent.* 50.

Stable verſus *Sayle.*

Winford. Trin. 5 W. in C. B.

Yorkſh. ſſ. THE Plaintiff declared, That Iſſue was joined between ſuch and ſuch Parties, to be tried at the Aſſizes in Yorkſhire, and that the Plaintiff was produced as an Witneſs at the ſaid Trial, and ſworn to ſpeak the Truth, which he did, but the Defendant maliciouſly to diſgrace him ſaid, Sirrah, thou wert forſworn at that Trial; upon Not guilty pleaded, the Plaintiff had a Verdict and Judgment.

For, as the Serjeant rightly ſays, this was not like the Caſe of * *Molton* and *Clapham*, but like that of *Needham* and *Carſellis*, *Cro. Eliz.* 293. and of *Mayne* and *Okey*, 2 *Jones* 5. and leaves his Reader to ſeek what they were.

* *March* 20.

The Caſe of *Molton* and *Clapham* was thus: ſſ. There were Affidavits read againſt the Defendant *Clapham* in Court, and he ſpoke openly, that there was not a Word true in them: *Molton* who made the Affidavits brought the Action, and adjudged that it did not lie, becauſe the Words were not maliciouſly ſpoken, but in Defence of his Cauſe which was then depending; but in the other Caſes the Words were ſpoken *after the Trials*, and with an evil and malicious Intent to ſlander and diſgrace the Plaintiffs; and therefore they had Judgment.

There have been ſome Diſtinctions made upon the like Words in our Books, as for Inſtance, to ſay a Man is *forſworn* generally, is not actionable, becauſe 'tis an equivocal Word, and it may be in common Converſation; neither is it actionable to ſay, A Man is forſworn in ſuch a Court, if it is in an inferior Court, without ſhewing what that Court is; becauſe the Courts at *Weſtminſter* cannot take Notice of any Authority in an inferior Court, to adminiſter an Oath, or to hold Plea in Matters of Record, without ſhewing it.

2 *Cro.* 190. 436.

But if it appear it was a Court of Record, or that there was an Action depending, then 'tis actionable to ſay, a Man is forſworn in an inferior Court.

Howe verſus *Perry.*

Winford. Mich. 11 W. III.

Glouceſter, ſſ. SLANDER, ſſ. The Plaintiff ſets forth, that he was formerly choſen Knight of the Shire for the County of Glouceſter, and intending to ſtand Candidate at the next

Election, there being a Writ iſſued out to chooſe two Knights, &c. the Defendant before the Election ſaid, *Jack Howe* is an Enemy to the King and Kingdom, and in the *French* Intereſt.

It doth not appear by the Book what became of the Caſe, but certainly the Words are actionable to the higheſt Degree, and the Plaintiff had a Verdict and conſiderable Damages; and upon a Writ of Error brought in Parliament, the Judgment was affirmed.

Witherald verſus *Clarkſon.*

Cooke. Mich. 12 W. III. Rot. 1307.

York, ſſ. SLANDER brought by a ſingle Woman, for theſe Words, You are a Whore and a forſworn Jade, and I will prove you one; by Reaſon whereof, ſeveral Perſons who courted her before the ſpeaking thoſe Words, did now avoid her Company.

The Plaintiff had a Verdict, but the Judgment was arreſted, becauſe ſhe had not ſet forth in her Declaration, the Loſs of her Marriage with any particular Perſon.

'Tis true, the Books are ſo, *viz.* That the Plaintiff muſt alledge the Loſs of Marriage; and that the Action will not lie without it. *Cro. Car.* 404. *Latch* 218. *Cro. Car.* 155.

Treſpaſs.

Trespass.

Hare versus *Hampson* & al'.

Mich. 35 Car. II. Rot. 301.

Norfolk, ff. TRESPASS for taking the Plaintiff's Nag in a Place called Boughton in the said County.

The Defendant pleads in Bar, That before the Trespass supposed to be done, the Earl of St. Albans, Sir Kenelm Digby, and other Trustees for the late Queen Henrietta Maria, were seized in Fee of the Honour of Clare, in the Counties of Norfolk, Cambridge, and Huntingdon, and being so seized, demised the said Honour to the Defendant Serjeant Hampson for twenty-two Years; that Sir Thomas Hare was seized in Fee of the Manor of Boughton, which he held of the Honour of Clare, and that there was a Custom, Time out of Mind, within the said Honour, for the Lord thereof to have Fines upon Descents, Alienations and Purchases of those who held any Lands of that Honour, viz. For every House 1 s. for every Acre of Land enclosed 1 s. and if not inclosed 6 d. (except those who held of the said Honour by the Payment of a certain Sum) for which the Lord of the said Manor might distrain, *&c.* pound, *&c.*

That Sir Ralph Hare, the Father of the Plaintiff, died seized in Fee of the said Manor, and of several other Lands and Tenements in the said County of *Norfolk*, upon whose Death the same descended to the Plaintiff, being his Son and Heir; and for not paying the Fine, the Defendants distrained and carried away the Nag, *&c.*

The Plaintiff replied, and denied the Custom, and concluded to the Country; and upon Demurrer had Judgment upon a Motion, without any Argument; for it seems the Practice is, That if the Defendant demurs, and 'tis entered in the Prothonotary's Books to be argued, and he neglects to maintain his Demurrer, the Plaintiff shall have Judgment of Course.

And

And ſo it would have been, if the Demurrer had been argued, if the Opinion of the Serjeant is Law; viz. That if the Cuſtom had been good, yet the Plea was naught, becauſe 'tis incertain of how many Acres the Plaintiff's Father died ſeized; 'tis only ſaid, That if he died ſeized of the Manor, &c. and of divers other Lands and Tenements in Norfolk, when he ſhould have ſhewed, that he died ſeized of Meſſuages held of the Manor of Boughton, and of ſo many Acres incloſed, &c. and this he ought to have done to bring his Caſe within the Cuſtom; and then he ought to aver, that thoſe Meſſuages and Lands were not within the Exception.

The Cuſtom as alledged in the Beginning of the Plea is to diſtrain and pound; but the Concluſion thereof did not anſwer that Cuſtom, becauſe the Defendants ſay they diſtrained and carried away the Nag.

Sharpe verſus *French*.

Cooke. Hill. 36 & 37 Car. II. Rot. 1311.

Somerſet, ſſ. THE Plaintiff Sharpe being Rector of the Pariſh Church of Seburrow, brought an Action of Treſpaſs againſt the Defendant, for breaking and entring his Cloſe and Parſonage houſe, and for taking and carrying away his Tithes.

Upon Not guilty pleaded, there was a ſpecial Verdict, the Subſtance whereof was, ſſ. That the Cloſe and Houſe were Parcel of the Rectory of Seburrow, and that the Plaintiff Sharpe was lawful Rector thereof; that it was a Rectory with Cure, &c. and under the yearly Value of 8 l. in the First-Fruits Book, but now of the real Value of 50 l. by the Year; that the Plaintiff accepted another Benefice with Cure, &c. and was lawfully inſtituted and inducted thereunto, for the Space of ſix Years laſt paſt.

That Richard Thorpe before, at and after the Acceptance of the ſecond Benefice by the Plaintiff Sharpe, was the Patron of Seburrow, but had no Notice of ſuch Acceptance.

That King Charles II. before the ſuppoſed Treſpaſs, preſented the Defendant French to the ſaid Church of Seburrow, who was thereupon inſtituted and inducted, and entered upon the Plaintiff; and ſo make a general Concluſion.

The Serjeant tells us that the Plaintiff had Judgment, but cannot certainly tell for what Reaſon, becauſe it was ſo long ago; and not taking any Notice of it himſelf, he reports it from another, but in a confuſed Manner; which I will make as intelligible as the Matter will bear.

The Queſtions upon this Verdict were,

1. Whether the Church was void within the Words of the Statute 21 H. 8. which are, That if any Perſon having one Benefice

with Cure of Souls, being of the yearly Value of 8 l. or above, accept another with Cure of Souls, and be inſtituted and inducted in Poſſeſſion of the ſame, that then, and immediately after ſuch Poſſeſſion had thereof, the firſt Benefice ſhall be adjudged in the Law to be void.

2. If the Church was not void, then the King's Preſentation to French was void; and by Conſequence he muſt be a Treſpaſſer, becauſe the Church was full of the Plaintiff.

And as to the firſt Point, If the Church was void facto & jure, not only againſt the rightful Patron, but againſt all other Perſons whatſoever; and then the King having preſented the Defendant, and he being inſtituted and inducted, it gives him a Title to the Glebe, tho' he was preſented by Uſurpation; and by Conſequence if he hath a Title, the Plaintiff can have none.

But the Verdict did not find that the Church was void by the Statute; for 'tis only found, that now it was of the yearly Value of 50 l. that is, at the Time of the Verdict; which may be very true, by Reaſon of the vaſt Advantages by late Improvements; and yet it may not be of the yearly Value of 8 l. at the Time of the Acceptance of the ſecond Benefice, which might be many Years ſince; for 'tis not found when he accepted it.

Now 'tis plain by that Statute, That he who accepts a ſecond Benefice, muſt at the very Time have another with Cure, &c. of the Value of 8 l. yearly, or more, otherwiſe the firſt is not void by this Act; and all the Pleadings upon this Statute are expreſly ſo, viz. That the firſt Benefice was of the yearly Value of 8 l. at the Time of the Acceptance of the ſecond.

Co. Ent. 369. 512. a. 514. c. Winch 670, 857.

Therefore this Matter ought to be preciſely proved to the Jury, becauſe 'tis an Affirmative; and in the Caſe of a Penal Statute made againſt the Common Law; which never made the firſt Benefice void, be it of what Value it will, upon the Acceptance of another.

Then as to the finding that the firſt Benefice (but the Serjeant ſays it is the ſecond Benefice) now is of the yearly Value of 50 l. that cannot be material, becauſe the Value muſt be taken as 'tis in the King's Books of the First-Fruits.

That is, as Eccleſiaſtical Livings were taxed and valued in the 26th Year of *H.* 8. which was not at the full and utmoſt Value, but very much under.

4 Inſt. 120. 26 H. 8. cap. 23.

My Lord *Coke* tells us, all Livings were valued in a Book of Taxation made 20 *Ed.* 1. but the laſt Valuation was made 26 *H.* 8. and by a Statute made in that Year, ſettled upon that King and his Succeſſors; ſo that the firſt Year's Profits of every ſpiritual Living was then, and hath ever ſince been paid by the new Incumbent, according as the Benefice was then valued; ſo is *Deg.* 23, 196. and not 29, as in the Report.

Therefore, if this is no Plurality within the Statute, becauſe it doth not appear that the firſt Benefice was of the yearly Value of 8 l. and more, according to the Valuation of the King's Book at that very Time; then he accepted the ſecond; then the Queſtion may

may be, Whether 'tis void by Common Law? Which is, viz. That he who takes a Benefice with Cure, if he had another before, he is *ipſo Jure* deprived of the firſt; and if he endeavour to keep it, he ſhall be deprived of the other; and the Patron of the firſt Living may preſent after the Acceptance of the ſecond.

Theſe are the Words of the Canon, by which 'tis plain that the firſt Living is void; but then ſome Doubts have been made, whether there muſt not be an actual Deprivation to make it void de Facto?

And becauſe there have been various Opinions upon this Matter, that the Law might be ſettled, this Diſtinction was made in Holland's Caſe, and was then, and hath ever ſince been allowed: ſſ. That ſince this is an Avoidance by the Eccleſiaſtical Law, the rightful Patron was not obliged to take Notice of it at his Peril, without actual Notice given him of the Acceptance of the ſecond Benefice; and if he had not ſuch Notice, no Lapſe incurred on him: 'Tis true, he might of himſelf take Notice of it if he pleaſed, and preſent another, tho' the Incumbent was neither deprived, or had reſign'd, but a Stranger could not in ſuch Caſe preſent without an actual Deprivation; ſo that the Church became void, not for the Diſadvantage of the true Patron, but for his Benefit; that is, he might take Notice of it if he would, and preſent another; but if he did not preſent, no Lapſe ſhould accrew to him. 2 Rol. Abr. 361.

So that in the principal Caſe, the King's Preſentation of the Defendant French was void, becauſe Sharpe, the Incumbent, who had accepted the ſecond Benefice, was not actually deprived of the firſt; and without Deprivation 'tis not void de Facto, but de Jure only, and that for the Benefit of the right Patron, and for him alone; and if the King had no Title, his Preſentee can have none.

'Tis true, a Man may be Incumbent as to all Eccleſiaſtical Matters, viz. To Offerings, Tithes, &c. and yet not be a perfect Incumbent, ſuch as the Law requires; and this is when the King preſents by Lapſe, having no ſuch Title; but then there muſt be a Vacancy de Facto, as well as de Jure; which was not in this Caſe. Hut. 66. Hob. 302.

There was a late Trial in Ejectment in B. R. between Dr. Haſcard, Dean of Windſor, and Dr. Sambre, Dean of Guernſey; wherein the Caſe was, ſſ. The Biſhop of Oxford ſuppoſing he had a Title by Lapſe, collated Dr. Haſcard to the Rectory of H. in Oxfordſhire; and this ſuppoſed Title of the Biſhop accrewed upon a Plurality within the aforeſaid Canon, but not within the Statute; but becauſe the Plaintiff could not prove that the Patron had Notice that Dr. Sambre had accepted of a ſecond Benefice, therefore for that very Reaſon the Collation was held void; but then it was inſiſted that it was void only as to the rightful Patron, but good as to all others; for ſuch a Collation prevented a Lapſe to the Metropolitan, or to the Queen. Anno 2 W. III. Cro. Eliz. 811. Owen 131.

But it was held that the Collation was totally void, and that the Right of the Patron was not in the leaſt avoided by it.

Baldwyn verſus *Noakes.*

Cooke. **Trin. 36 Car. II. Rot. 1241.**

Worceſter, ſſ. TRESPASS for breaking his Cloſe, called the Home-Cloſe, the 4th of Feb. 36 Car. II. and eating his Graſs, and breaking and entring into his Barn, and taking from thence a Cow and a Calf; with a Continuando the Treſpaſs as to the eating the Graſs from the 4th Day of February to the 4th Day of April following.

The Defendants as to the Force pleaded Not guilty, and to all the reſt they pleaded in Bar, That long before the ſuppoſed Treſpaſs Sir Francis Ruſſel was ſeized in Fee of the Manor of Selford, and that Thomas Baldwyn, late Husband of the Plaintiff, was ſeized in Fee of four Acres of Land held of the ſaid Manor, &c. and then ſets forth a Cuſtom within the ſame, for the Lord to ſeize a Heriot wherever it ſhould be found, for every Tenant dying ſeized of ſuch Lands.

That Thomas Baldwyn died ſeized of the ſaid four Acres, and poſſeſſed of a Cow and Calf, and that the Defendant by Command of the ſaid Sir Francis Ruſſel, ſeized the Cow in the Home-Cloſe for a Heriot, and which being in his Poſſeſſion calved, and that William Baldwyn took them both from the Defendants, and delivered them to the Plaintiff; whereupon the Defendants entered into the Cloſe and Barn, the Door being open, and retook them, quæ eſt eadem Tranſgreſſio: And upon Demurrer it was objected, That the Juſtification of the Entry into the Cloſe was not good; for admitting that William Baldwyn was a Trepaſſer in taking the Cow from the Defendants, and delivering it to the Plaintiff; yet they could not enter into the Barn to retake it, without being Treſpaſſers.

Cro. Eliz. 255, 246. 2 Rol. Abr. 564, N°. 4.

This was in the Caſe of a third Perſon, who took the Goods and delivered them to the Plaintiff; for if the Plaintiff himſelf had wrongfully taken them, or if another took them, and by the Aſſent of the Plaintiff had put them into his Cloſe; this is a Treſpaſs in the Plaintiff; and I may juſtify the retaking them in any Place where I find them; ſo that they are not out of my Poſſeſſion by my own Delivery.

Cro. Eliz. 329. *Keilw.* 30.

In the principal Caſe it appeared that the Property of the Cow was in Sir Francis Ruſſel, and that it was wrongfully taken from his Servants and delivered to the Plaintiff and put in her Barn, and it may reaſonably be preſumed that ſhe was privy to the Seizure, and ſo a Wrong-doer herſelf; and therefore the Defendants might retake them by the Command of the Owner.

Jones

Jones, Chief Juſtice, ſeemed to incline that the Cow was not in the Cloſe by any Wrong-doing of the Plaintiff; but Levinz was of a contrary Opinion, that when the Cow was wongfully taken and delivered to the Plaintiff, ſhe put it in her Barn, that this amounted to a Command to ſeize it.

There was an Exception taken to the Bar, That the continuando was not anſwered, for the Treſpaſs is alledged to be the fourth Day of February, with a continuando diverſis diebus & vicibus from that Day to the fourth Day of April enſuing; and the Defendants had juſtified the entring into the Cloſe and Barn on the fourth Day of February, to a Re-entry on the third Day of April to retake it; but have not anſwered thoſe Treſpaſſes alledged to be committed diverſis diebus & vicibus in the mean Time, ſo that the Juſtification doth not extend to any Thing done between thoſe Days.

But it was anſwered, That the Defendants have averred that 'tis eadem tranſgreſſio, which is as much as to ſay 'tis eadem cauſa actionis. Cro. Eliz. 705.

But Juſtice Levinz was of Opinion, That the continuando was not anſwered; there was no Judgment in the Caſe.

Payne verſus *Brigham* & al'.

Belvin. Hill. 36 & 37 Car. II. & 1 Jac. II. Rot. 1740.

Berks, ſſ. TRESPASS for breaking and entering his Cloſe called Brigham Mead, and ſpoiling and taking away his Graſs; and taking and carrying away five Loads of Hay.

The Defendants plead, That before the Treſpaſs, Thomas Brigham was ſeized in Fee of the Tithe-Hay, ariſing of and from the ſaid Mead, and ſo juſtifie the Taking, &c.

The Plaintiff, proteſtando that Thomas Brigham was not ſeized of the ſaid Tithes, replied, That the Defendants committed the Treſpaſs as before ſet forth in the Declaration, and that the Defendants took the Graſs which the Plaintiff had cut, and made it into Hay, and carried away five Loads, and traverſed that five Loads of Hay were ſet forth for Tithes; and upon a Special Demurrer the Defendant had Judgment, becauſe the Plaintiff had traverſed the quantity of Hay ſeparated for Tithes, which he ought not to do; for the Defendant having juſtified the entering the Cloſe, and taking the Tithes, that is ſufficient; let the Tithes be carried away in one or more Loads.

But an Exception was taken to the Bar, viz. That the Defendant had alledged a Seiſin in himſelf, without ſhewing of what Eſtate, which is not good in a Plea in Bar; but this Exception was diſallowed.

I ſuppoſe this was an Exception made by the Serjeant himſelf, who was of Counſel for the Plaintiff, and that he was not well pleaſed that the Court did not allow it, for he tells us, That there was a Caſe between *Saunders* and *Huſſey*, *Trin.* 8 W. 3. *Rot.* 466. in the Common Pleas, which was in Replevin: The Defendant avowed, That he was *ſeized* of three Acres, *&c.* and juſtifies the Taking the Cattle Damage Feaſant; and upon Demurrer the Avowry was held ill, becauſe 'tis not ſhewed of what Eſtate he was ſeized.

He farther tells us, That he had this *ex relatione* of Serjeant *Carthew*, who was of Counſel with the Plaintiff in that Caſe; but this muſt be a Miſtake, becauſe the Caſe was in the Common Pleas, and in *Trinity* Term 8 *W.* 3. and *Carthew* was not then a Serjeant.

If he had ſearched the Rolls, and told us from thence what the Judgment was, this would have been ſome Authority; but a Report from another, is altogether as uncertain as he would have this Plea be, *viz.* That the Defendant might be ſeized for Life, *per autre vie*, in Tail Several or Special, or in Fee, and therefore ſhould not be ſo far indulged as to amend upon Payment of Coſts.

2. Exception, That the Defendant being a Lay-Man, could not plead a Seiſin of the Tithes.

2 *Cro.* 437. And this, he tells us, ſeems to be a ſtrong Objection according to the Caſe of *Saunders* and *Sanford*, in 2 *Cro.* which I think is a ſtrong Authority againſt him.

It was Default upon the Statute of 2 *Edw.* 6. for not ſetting out Tithes, in which the Plaintiff declared, That he was *ſeized in Fee* of ſuch a Portion of Tithes, *&c.* the Defendant was Occupier of the Lands on which they did grow, *&c.* upon *nil debet* pleaded, it was found for the Plaintiff; and it was moved in Arreſt of Judgment, That the Plaintiff would not intitle himſelf to Tithes, being a *Lay-Man*, without ſhewing *how*; for it being a Profit ariſing in another Man's Soil, he ought to ſhew *how* he was intitled, or that it was Parcel of ſuch an Abbey or Spiritual Corporation, who might lawfully have Tithes; but the Objection was diſallowed, for the Action was grounded upon a Tort, and therefore he need not ſhew any Title; for if it had been brought by one who is *firmarius*, that had been ſufficient.

Beresford verſus *Bacon* & al'.

Belvin. Hill. 1 Jac. II. Rot. 448. C. B.

Derbyſhire, ſs. TRESPASS for breaking his Cloſe called Newton Moore, in the Pariſh of Aſhborne, and digging and turning up his Soil; and taking and carrying away a Load of Lead-Mine.

The Defendants plead as to all, except breaking the Cloſe, Not guilty; and as to that they ſay, That the Cloſe lies in King's-Field within the Hundred of Wickſworth; and then alledge a Cuſtom in the ſaid Place called King's-Field, quod bene, leaving out the Word licuit, for any Perſon to work in Lead-Mines there, and to dig and ſubvert the Soil to find Lead Ore; and to take and carry away the ſame after uſual Duty is paid; that the Defendants entered the ſaid Cloſe to dig for Lead Ore, and according to Cuſtom digged for the ſame, and having found it there, they carried it away after the Duty paid; quæ eſt eadem fractio, &c. And upon Demurrer the Plaintiff had Judgment;

Becauſe the Allegation of the Cuſtom was imperfect, by Reaſon of the Omiſſion of the Word licuit, but if that Word had been in the Plea, yet the Cuſtom it ſelf is not well ſet forth, becauſe it ought to be poſitively alledged by an Uſage in Fact.

Which was not done in this Caſe, for it is *quod bene licuit* for any Perſon to work there, which is not a poſitive Allegation of the Uſage; it ſhould have been *uſi fuerant, &c.*

So where a Man was diſfranchiſed of his Freedom in a Corporation, and had a Writ of Reſtitution directed to the Chief Officer, who returned, that for ſuch Facts Perſons have *been accuſtomed* to be removed; this is a poſitive Objection that they have been removed; 'tis merely imaginary *& in fieri*, and imports no more than that it may be done, and not *in facto* that it was ever done.

Beſides, the Cuſtom ought to have been alledged in ſome Manor, Vill or Pariſh; or that 'tis the Cuſtom of ſome Hundred or County, but there 'tis only alledged to be a Cuſtom within a particular Cloſe, called King's-field, which is ill; for a Cuſtom cannot extend to a particular Field or Cloſe.

And therefore where in an Action on the Caſe, for erecting a Building croſs a Way, the Plaintiff declared, That his Wife before Marriage, was poſſeſſed of a Term for Years in a *Cloſe*, and that the Defendant had another Cloſe adjoining, in the Pariſh of St. *Martin's &c.* and then ſets forth a Cuſtom within the Pariſh, That all Occupiers of the Plaintiff's *Cloſe*, had a Way from thence to ſuch a Place, *&c.* upon Not guilty pleaded, the Plaintiff had a Verdict, but the Judgment was arreſted, becauſe he could not apply a Cuſtom in a Pariſh to a particular Cloſe within the ſame Pariſh. *Cro. Car.* 418.

'Tis then alledged, That the Cuſtom is to dig, take and carry away the Reſidue of Lead Ore, after the cuſtomary Duties paid; and 'tis not ſhewed what thoſe Duties are, or to whom they are to be paid; and this being Part of the Cuſtom, ought to be particularly alledged; for which the Reaſons Defendant had Judgment.

Gee,

Gee verſus *Wilden* & al'.

Cooke. Paſ. 1 Jac. 2. Rot. 494.

Litchfield City, ſſ. TRESPASS for breaking and entering his Houſe, and taking two Pewter Diſhes.

The Defendants, proteſtando that the Goods in the Declaration mentioned, did not exceed the Value of 3 s. 4 d. plead, That the Bailiffs, Citizens and Freemen Tailors of the ſaid City, have Time out of Memory been incorporated by the Name of Maſter, Warden and Brethren, &c. and ſo preſcribe to make By-Laws for the better Government of their Company; that before the ſuppoſed Treſpaſs a By-Law was made, That every Year within one Month after Midſummer, they ſhould chooſe a Maſter and two Church-wardens; who were to continue for a Year, and that upon the Day of Election, there ſhould be a convenient Dinner for the Maſter and Company, and that every one ſhould pay his Share towards the firſt Dinner; and that if any ſhould be abſent, he ſhould pay into the Common Stock, as much as the Maſter paid for his Dinner, upon Pain of forfeiting 3 s. 4 d. and that it ſhould be lawful for the Maſter and Wardens to diſtrain for the ſame; that Anno 18 Eliz. thoſe By-Laws were approved by Sir Edward Saunders then Chief Baron; according to the Act of Parliament 19 H. 7.

That the Plaintiff was made free of the Company, and had Notice of the By-Laws, and took his Oath before the Bailiffs of that City, to obſerve the ſame; that within a Month after Midſummer, the Maſter and Wardens were choſen, &c. That a Dinner was then provided, and the Plaintiff was not there; that he had not paid his Share, but had forfeited 3 s. 4 d. that it was demanded by the Defendants, being Maſter and Wardens of the Company, but the Plaintiff refuſed to pay it, whereupon they entered the Houſe, the Doors being open, and diſtrained the Goods, &c.

And upon Demurrer the Court held this to be a good By-Law, upon the Authority of Wallis's Caſe, who was a Burgeſs of *Ipſwich*, and committed to Priſon, and upon the Return of an *Habeas Corpus*, the Cauſe of his Commitment appeared to be, *viz.* That there was a Cuſtom in *Ipſwich*, to elect two Burgeſſes every Year, who uſed to make a *Feaſt* upon a certain Day, and that the Defendant was elected, but refuſed to make a Feaſt, for which he was fined 20 *l.* and committed till he paid it; and that was held to be a good Cuſtom.

But then it was adjudged, That the Breach of this By-Law was not well aſſigned; becauſe 'tis not alledged that the Plaintiff had Notice how much the Maſter paid for his Share towards his Dinner, and the Defendant ſhould have ſet forth a preciſe Demand of it; for the Plaintiff was not to incur the Penalty, unleſs he failed in Payment of that very Sum.

Hutchinſon verſus *Jackſon* & al'.

Belvin. Trin. 2 Jac. II. Rot. 612 C. B.

Cambridge, ſſ. THE Plaintiff brought Treſpaſs for breaking and entering his Cloſe called Highmore in Glaſſonby.

The Defendant Jackſon pleads, That before the ſuppoſed Treſpaſs, the Earl of Suſſex was ſeized in Fee of the Manor of Glaſſonby, of which one Meſſuage and forty Acres of Paſture-Land were Parcel, & dimiſſa & dimiſſibilia in Fee by Copy of Court-Roll ad voluntatem Domini according to the Cuſtom of the ſaid Manor, and deſcendable, and which do deſcend from Anceſtor to Heir, in a Courſe of Succeſſion called Tenant-Right; that the ſaid Earl granted the Premiſſes by Copy of Court-Roll, to the Defendant Jackſon and his Heirs; and then alledges a Cuſtom for every Copyholder of the ſaid Manor, to have Common in the ſaid Paſture-Lands; and ſo juſtifies the Chaſing the Cattle Damage-Feaſant.

The other Defendant Dawſon pleads the like Plea, and the Plaintiff demurred Specially, and ſhewed for Cauſe, That the Plea was repugnant and contradictory in itſelf; for the Defendants had alledged, That the Copyhold Premiſſes were Time out of Mind demiſeable by Copy of Court-Roll, and yet they ſay, They were deſcendable from Anceſtor to Heir, which is abſurd; and for this Cauſe the Plaintiff had Judgment.

Leight verſus *Pym* & al'.

Belvin Trin. 2 Jac. II. Rot. 1900.

Worceſter, ſſ. TRESPASS for breaking and entering his Malt-houſe at Claines, and taking and carrying away one Hundred Buſhels of Malt.

The Defendants juſtifie under the New Charter granted to the City of Briſtol by Car. 2. ſetting forth, That 2 Junii, 36 Car. 2. the City was incorporated by the Name of Mayor, Burgeſſes, &c. That they had a Grant of a Market for all Grain imported there, to be bought and ſold, and to take ſuch Toll as the Mayor and Aldermen ſhould think fit; that the Mayor, &c. appointed ſixteen Quarts of Malt, or 8 d. in Money, to be taken for every twenty Buſhels of Malt brought by Water to the Market, of which publick Notice was given in the Market-Place; and that the Plaintiff

had brought twenty Buſhels, &c. to the Market, and though the Toll was demanded, he had not paid the ſame; and ſo they juſtifie the taking, quæ eſt eadem Captio, and traverſe, that they were guilty of taking at Claines or elſewhere out of the City of Briſtol.

The Plaintiff, proteſtando that it was not a reaſonable Toll, pleads, That he is a Burgeſs of Tewksbury in Com' Glouceſter, and that Ed. 3. Anno 11 of his Reign, by Letters Patents granted, That the Burgeſſes of Tewksbury, and their Heirs and Succeſſors, ſhould be exempted from Toll and Cuſtoms, &c.

The Defendants rejoin, and crave Oyer of the Letters Patents, which are ſet forth in hæc verba, and then they ſay, That the Bailiffs and Burgeſſes of Tewksbury, 24 Martii, 2 Jac. 2. ſurrendered their Charter to the King.

The Plaintiff craves Oyer of the Surrender, which was likewiſe ſet forth in hæc verba, and upon Demurrer it was inſiſted for him,

1. That the Charter of Exemption was prior in Time to the Charter granted to the City of Briſtol; and that the Privilege claimed by it was perſonal, and inherent in every Burgeſs of Tewksbury, and could not be deſtroyed by the Surrender.

That not only the Toll, but the Diſtreſs was unreaſonable, and that it being to be paid in Money or Grain, one of them ought to be demanded.

But theſe Points were not reſolved, for one of the Judges objected, That it doth not appear by the Plea, that the Malt was ſold, for if not, then Toll was not due; for by Law 'tis only for Goods ſold, unleſs by Special Cuſtom, which cannot be in this Caſe, becauſe the Corporation was eſtabliſhed within Time of Memory.

And to prove this 2 *Inſt.* 221. was cited, but 'tis in 220. where my Lord *Coke* ſaith, That *communi jure* Toll ſhall not be paid for Things brought to a Fair or Market, unleſs they are *ſold*, and then Toll is to be taken of the * Buyer; but Toll may be paid in antient Fairs and Markets for the ſtanding there, though nothing is ſold.

* 2 *Rol. Abr.* 522. *pl.* 5. 9 *H.* 6. 45.

In *F. N.* B. 228. there is nothing to the Purpoſe, for all that Page treats only of Tenants in antient Demeſne, and the Lords of ſuch Tenants, and that they ſhall be diſcharged of paying Toll.

Meriton

Meriton verſus *Benn* & al'.

Belvin. Trin. 2 Jac. II. Rot. 349.

Hertford, ſ. IN Treſpaſs, the Writ was quare vi & armis Clauſum fregit, and the Declaration was for breaking and entering three Cloſes, &c.

The Defendant pleads, That long before the ſuppoſed Treſpaſs, one Alice Catmer was ſeized of the ſaid Cloſes in Fee, which ſhe deviſed to Thomas Catmer and his heirs, and died ſeized; That the Devisee entered, and was ſeized; and that the Plaintiff entered, claiming an Eſtate for Life in the Premiſſes made to her by the ſaid Alice Catmer, upon whom the Defendant, as Servant to the ſaid Thomas Catmer, did re-enter, &c.

The Plaintiff, proteſtando that the ſaid Alice Catmer did not die ſeized, &c. replied, That before the ſaid Thomas Catmer had any Title, Humfrey and Francis Steward were ſeized, &c. in Fee, and that they made a Leaſe of the Premiſſes to Henry Catmer for 1000 Years; who made Alice Catmer his Executrix, and died; and that ſhe aſſigned the Reſidue of the ſaid Term, to one William Meriton, (under whom the Plaintiff claimed) prout per indenturam conceſſionis & aſſignationis, &c. hic in Curia prolat' plenius apparet, &c.

Upon Demurrer to this Replication it was objected,

1. That there was a Variance between the Writ and the Declaration, for one was quare clauſum fregit, and the other was for a Treſpaſs in three Cloſes.

And for this very Reaſon a Judgment was reverſed, upon a Writ brought in *C. B. Anno* 32 *Eliz.* but in *Anno* 19 *Jac.* the original Writ concluded *ad damnum* 40 *l.* and the Declaration was *ad damnum* 100 *l.* and the Plaintiff had Judgment, which was affirmed upon a Writ of Error; for though this Variance might be a good Exception upon a Demurrer, 'tis not ſo after a Verdict. 20 *H.* 6. 42. * *Cro. Eliz.* 185.

It ſeems formerly this was an Exception upon a Demurrer, but it was not ſo now, and therefore it was diſallowed.

2. That the Bar was neither anſwered, avoided or traverſed by this Replication; for the Plea was, That Alice Catmer was ſeized in Fee, and deviſed it to Thomas Catmer; and the Replication is, That before Thomas Catmer had any Title, the two Stewards were ſeized in Fee, &c. which may be true, and yet Anne Catmer might be ſeized before, and be diſſeized by them; and that ſhe might re-enter and die ſeized. *Litt. Rep.* 353.

But this Exception was likewiſe diſallowed; for when a Seiſin in Fee is alledged, it muſt be intended a lawful Seiſin until the contrary appears.

There was another Miſtake in the Replication; for the Plaintiff ſets forth, That before Thomas Catmer had any Title, &c. it ſhould be Anne Catmer, for the Defendant claimed under her originally; and therefore the Seiſin in Fee of Alice ought to be anſwered, for it was expreſly alledged in the Bar; and this muſt be a Fault if Hering and Blucklow's Caſe is Law; which was thus,

Cro. Eliz. 30. *Dyer* 313. B. *ſſ.* In Replevin, the Defendant avowed the taking the Cattle Damage-feaſant, and ſhewed that *H. was ſeized in Fee*, and demiſed the Land to the ſaid Defendant for 21 Years, *&c.*

The Plaintiff in Bar to the Avowry pleaded, That *H.* 8. *was ſeized in Fee, &c.* and that the Land was Copyhold, and that the King granted it to him in Fee; and it was adjudged upon Demurrer, That where the Defendant doth alledge a *Seiſin in Fee* in any one from whom he claims, the Plaintiff cannot alledge a *Seiſin* in another, without traverſing, confeſſing or avoiding the Seiſin of the other.

* *Pigott's Caſe.* *Yelv.* 54. 2 *Cro.* 44. idem.

There is another * Caſe cited, but 'tis not to the Purpoſe in either of thoſe Books in which 'tis reported.

3. The Plaintiff made a Title under a Leaſe for a Term for Years, which were veſted in an Executrix, and that ſhe granted and aſſigned the Reſidue of the ſaid Term prout per Indenturam conceſſionis & aſſignationis inde plenius apparet, which is not a direct Affirmation of the Aſſignment; it ſhould have been poſitively alledged, That Alice Catmer by Indenture, &c. conceſſit; for to ſay that ſhe conceſſit prout per Indenturam apparet is not poſitive, becauſe it refers to the Indenture for the Certainty.

1 *Saund.* 275. And to prove this there was a very unuſual Citation; for it was the ſingle Opinion of *Saunders*, not when he was Chief Juſtice, but when he was at the Bar: It was in the Caſe between the *King* and *Sutton*, which was an Information againſt a Debtor of a *Felo de ſe*, ſuggeſting that the Defendant was indebted to the deceaſed in 80*l.* *prout patet per Obligationem*, which he held was no direct Charge, that he was bound in a Bond of 80*l.*

In 21 *Ed.* 4. 44. an Abbot pleaded a *Patent* of Exemption to be Collector of Tithes thus: *ſſ.* That in *Eaſter* Term, *&c. inter alia continetur*, that the King, *&c.* and ſo recites the Words of the Patent; and this was held an ill Plea, becauſe it was not a poſitive Allegation, that the King did grant, *&c.* but it was only a Rehearſal of a Grant *inter alia.*

Plowd. Com. 143. *a.* So where in Treſpaſs the Defendant juſtified the entring, for that there was a Leaſe executed by the Plaintiff for Payment of Rent, and moreover, that in the ſaid Leaſe *it was contained* that if the Rent was behind, then the now Plaintiff had covenanted that the Leaſe ſhould be void; that the Rent was behind, and thereupon the Leaſe being void, the Defendant entered; upon a Demurrer this was held to be ill pleading, becauſe it was not *expreſly* alledged that the Plaintiff *did covenant* that the Leaſe ſhould be void upon Non-payment of Rent, but only that it was ſo contained in the Indenture.

And for this ill Pleading, Judgment was given againſt the Plaintiff in the principal Caſe.

Johnſon verſus *Wyard*, & al'.

Winford. Hill 2 & 3 Jac. II. Rot. 1397.

Suffolk, ſſ. TRESPASS for an Aſſault, &c. and entering his Cloſe called the Gravel-Pit, and carrying away two Poſts and 100 Loads of Flint and Gravel.

The Defendants plead in Bar, That Time out of Mind there was an open Gravel-Pit in the ſaid Cloſe, in which Pit the Inhabitants of the Pariſh of Horningſheard digged Stones and Gravel to repair the Highways, &c. which Ways were then in Decay; and the Defendants being Inhabitants of that Pariſh, and two of them Surveyors of the Highways, entered into the Cloſe to dig Stones, and there being two Poſts ſet up that they could not come at the Gravel-Pit, they pulled them down, and then digged Gravel to mend the Ways; which Gravel they carried away, quæ eſt eadem intratio, &c. and upon Demurrer it was inſiſted,

That this Preſcription was not good, either as to the Perſons or Matter.

1. As to the Perſons; it was too general for the Inhabitants of a Place to preſcribe, becauſe Sojourners, Apprentices, Children and Servants, are all within that comprehenſive Word; and ſo is every Man that hath but a perſonal Reſidence in the Pariſh. 2 *Inſt.* 703.

2. As to the Matter, viz. It was for a Profit to be taken in alieno ſolo; for which Inhabitants of a Town or Pariſh cannot preſcribe.

In † *Gatewards* there was a Cuſtom alledged for the *Inhabitants* of a Pariſh, living in ancient Meſſuages, to have Right of Common in ſuch a Field *ratione Commorantiæ*; and this was held to be a Cuſtom againſt Law: *ſſ.* That an *Inhabitant* ſhould have a Common where he hath no Manner of Intereſt in the Houſe; for if that ſhould be admitted, his Right would be only tranſitory, and for no certain Time or Eſtate, but during his *Inhabitancy* there; and this (if it may be called an Intereſt) is ſuch as the Law will not ſuffer, becauſe a Cuſtom ought to extend to that which hath a Certainty or Continuance. † 6 *Rep.* 60.

The Judges in that Caſe diſtinguiſhed between Cuſtoms which make a Charge in the Land of another, and thoſe which work a Diſcharge in his own Lands; and likewiſe between an Intereſt or Profit to be taken in the Land of another, and an Eaſement only.

And therefore they held, That the *Inhabitants* of a Town may alledge the Payment of a *Modus* in lieu of Tithes, becauſe 'tis not to claim either a *Charge or Profit* in another Man's Land, but a *Diſcharge* in his own.

So a Cuſtom for *Inhabitants, &c.* to have a *Way* over the Land of another, either to Church or to Market, is good, becauſe 'tis an *Eaſement* only, and no Profit.

Then it was argued that there could be no Occaſion to ſupport this Cuſtom, becauſe by ſeveral Statutes 'tis provided that the Ways ſhould be repaired, and by what Means; and therefore there cannot be any Manner of Neceſſity either for a Preſcription or Cuſtom to repair them, becauſe that would be to make thoſe Statutes ineffectual.

Beſides, 'tis unreaſonable that the Defendants ſhould dig in the Plaintiff's Soil, without making any Recompence for the ſame.

But it was inſiſted for the Defendants, That if 'tis Law, that Inhabitants of a particular Parith may * preſcribe for a Way, then certainly they may preſcribe to dig for neceſſary Materials to repair that Way.

* Cro. Eliz. 664.

They may preſcribe to have a common † Watering-place in a Parith, which being ſtop'd, any Inhabitant there may bring an Action, &c.

† 1 Inſt. 56.

They may alledge a Cuſtom to take ** Ruſhes in a particular Place to ſtrew in the Church, and to dig and carry away †† Clay for their neceſſary Uſe.

**March 16.
†† Cro. Eliz. 434.
Moor 411.

A Cuſtom for the Freemen and Proprietors of Ships in *Lyn* to dig Gravel in ſuch a Place for Ballaſt is good, becauſe 'tis to maintain Navigation, which is for the publick Good; and ſo 'tis to repair the Highways; for the *Inhabitants, &c.* do not claim any particular Profit for themſelves, but for the publick Uſe and Benefit; and therefore 'tis very reaſonable to ſupport this Cuſtom.

3 *Lev.* 160.

As to the Objection, That this Cuſtom cannot be good without ſome Recompence for digging in another Man's Soil; it was anſwered, That a Conſideration might eaſily be intended, for probably the Plaintiff might be bound by the Tenure of his Land to repair the Highways.

2 Cro. 25.

But 'tis good without any Conſideration ſet forth; 'tis like a Preſcription to have Timber to repair old, or to build new Houſes, which is good without any Manner of Conſideration expreſſed.

Then as to the Statutes concerning Repairs of Highways, there are no negative Words in them; they are all affirmative Laws, and in no wiſe concern this Caſe.

There was no Judgment given, for the Parties agreed.

Kilborne verſus *Vallente* & al'.

Belvin. Hill. 2 & 3 Jac. II. Rot. 1448.

Derbyſhire, ſ. TRESPASS for breaking and entring his Cloſe, called Gorſty-Cloſe, and eating his Graſs with Horſes and Hogs, and for breaking 20 Perches of Hedge.

The Defendants plead in Bar, That before the ſuppoſed Treſpaſs one Anchitell Grey was ſeized in Fee of the Manor of Dale; then

then they alledge a Prescription to dig any where in the Village of Stanley for Coal, except in Gardens, &c. as belonging to the said Manor.

That the Defendants as his Servants entered into Gorsty Close which was in the Village of Stanley, and no Garden, &c. and digged there for Coals, and carried them away in Carucis of the said Archibell Grey, viewing them cum averiis suis, and for his Use, &c. and because there was not a sufficient Passage to and from the said Close, they opened a convenient and necessary Way to carry away the said Coals, &c.

The Plaintiff replied, That the Defendants entered the Close de injuria sua propria absque tali causa, as they had alledged, but did not traverse the Prescription particularly; and upon Demurrer to the Replication,

First, it was objected against the Bar, That the Trespass is alledged in the Declaration to be done with Hogs and other Cattel, and the Justification is cum averiis carucas trahentibus.

'Tis true, Hogs may be comprehended by the Word *Averiis*; but as the Serjeant very well observes, it cannot be so in this Place, because 'tis *carucas trahentibus*; and the Carts in *Derbyshire* are not drawn with Hogs, tho' in *Oxfordshire* 'tis said that Pigs play upon Organs.

But it seems the Court did not regard this Exception, but assisted the Counsel with a better: ff. That the Declaration was for breaking 20 Perches of Hedge; and the Plea was, That they opened a convenient and necessary Way, which they might very well do without pulling down so much Hedge; therefore they have not made any Justification for breaking more Hedge than was necessary to open a convenient Way: They ought to have pleaded Not guilty to Part, and shew in what Part, and to justify for the rest, or rather to justify for the whole.

As where an Action on the Case was brought for stopping three Lights, the Defendant justified the stopping two and Part of the Third; and upon Demurrer, the Plaintiff had Judgment, because the Justification did not go to the whole Charge. *Yelv.* 234.

And for this Reason the Plaintiff had Judgment in the principal Case, without any Resolution concerning the Validity of the Prescription, and without any Debate, whether the Replication was good, without a particular Traverse of the Prescription; which should have been thus: ff. *Absque hoc*, that the said *Archibell Grey*, and all those whose Estates he had in the Premisses, have Time out of Memory, *&c.* used to enter into any Close in the said Parish to dig for Coals: Now all this was omitted, and the Plaintiff had traversed it generally. ff. That the Defendants entered the Close *de injuria sua propria absque tali causa*, as they had alledged in their Plea.

And as to this Manner of Pleading, the Serjeant cited some Cases, which seem to incline both Ways.

As for instance, In Trespass the Defendant justified by Vertue of a Custom of the Manor of *T. &c.*

Hob. 76. The Plaintiff replied *de injuria ſua propria abſque tali cauſa, &c.* All that my Lord *Hobart* ſays there relating to this Matter is, That the Plaintiff ſhould not have traverſed the Cauſes generally by theſe Words *abſque tali cauſa*; but the Cuſtom it ſelf.

3 *Lev.* 48. But in Replevin the Defendant ſet forth a Cuſtom to make By-Laws, and juſtified the diſtraining for a Penalty upon a By-Law; the Plaintiff replied *de injuria ſua propria abſque tali cauſa*; and upon Demurrer the Replication was held good without a particular Traverſe of the Cuſtom.

3 *Lev.* 65. 'Tis true, in the ſame Book, and in the very next Year, there is a Caſe which ſeems to prove the contrary. *Iſſ.* It was an Action of Aſſault and Falſe Impriſonment.

The Defendant juſtified by Vertue of a *Latitat* directed to the Sheriff of *Devon*, and a Warrant and Arreſt at *D.* on the 20th of *May, &c. abſque hoc* that he was guilty *aliter vel alio modo*.

The Plaintiff replied, *de injuria ſua propria abſque tali cauſa*, and upon Demurrer this Replication was held ill; but it was becauſe there was Matter of Record and Fact, and other Things in the Plea; and therefore the Plaintiff ought to have traverſed or anſwered it in a particular Manner, and not generally, by ſaying *abſque tali cauſa*.

And after all, it ſeems to be a mere Nicety in pleading; for *abſque tali cauſa* muſt be a Traverſe of that Cauſe which the Defendant had alledged for his Juſtification; 'tis a ſhorter way of Expreſſion; and my Lord *Hobart* himſelf in the Caſe before-mentioned doth not deny but that it is as effectual a Denial of the Cauſe of Juſtification, as if it had been particularly traverſed in thoſe very Words by which the Defendant juſtified; for he tells us, that *abſque tali cauſa* comprehends that and more.

Poplewell verſus *Goſling* & al'.

Winford. Hill. 2 & 3 Jac. II. Rot 1890.

Yorkſhire, ſſ. IN Treſpaſs for taking a Gelding.

The Defendant juſtified by Vertue of a Judgment obtained in the County-Court againſt the Plaintiff alone, coram Sectatoribus, *&c.* in an Action of Treſpaſs brought there againſt him and his Wife, wherein they were both convicted; that there was a Fi. fa. upon that Judgment, and that he took the Gelding by Vertue of that Writ.

And upon Demurrer this Plea was held ill, 1. Becauſe the Names of the Suitors before whom the Court was held were not named.

This would have made the Plea longer by repeating ſo many Names as there had been Suitors at the Court; * 'tis true, 'tis ſo in *Thompſon's Entries* 312. *pl.* 23. but the Reaſon why it muſt be ſo is not given in this Judgment.

* 2 *Lut.* 1370.

2. It

2. It is not alledged that a Plaint was levied; beſides, the Action was brought againſt Husband and Wife, and the Judgment was againſt the Husband alone.

'Tis true, the Defendant hath afterwards ſet forth, That they were both convict, but that will not help what was before inſufficiently alledged.

There is no Caſe cited to warrant this Judgment, though the Serjeant tells us, That many were mentioned in Court, which he very prudently declines to ſet down in particular; for amongſt many Citations there will be ſome Miſtakes, eſpecially when Men do not examine what they write.

Mellor verſus *Boeking*.

Cooke. Hill. 2 & 3 Jac. II. Rot. 446.

Derbyſhire, ſl. TRESPASS for taking a Cow.

The Defendant pleads in Bar, That King Charles II. was ſeized in Fee of the Manor of Highpeake, in Right of his Dutchy of Lancaſter; and by Indenture under the Dutchy-Seal, he demiſed to John Shallcroſſe, for twenty Years, all Eſtrays happening within that Manor, under whoſe Title the Defendant as Servant, &c. juſtifies the taking juvencam præd' being an Eſtray coming into the ſaid Manor, &c. And upon Demurrer to this Plea it was held to be ill; becauſe the Defendant had not anſwered the Declaration, for that was for a Cow, and the Juſtification was for taking an Heifer.

If he had juſtified for taking a *Bull*, when he had been charged in the Declaration for taking a *Cow*, there might have been ſome Colour for this Exception, becauſe they differ in *Gender*; but I think there is no more Difference between *vacca & juvenca* than there is between *porca & Sucula*, for one ſignifies a Sow, and the other a young Sow.

To make any Difference between theſe Words is a Nicety which might admit of a little Wrangle amongſt Grammarians; but it ſeems to be *ſummum jus* if it ſhould be admitted amongſt Lawyers, to delay any Remedy for an Injury done.

The Serjeant, like an excellent Logician, defines a Heifer to be an Animal which never had a Calf; and as a Comment upon this Definition he tells us, That the Word *Vacca* always ſuppoſes the contrary, and that *juvenca & vacca* are always diſtinguiſhed in Pleading.

I would feign know where theſe Definitions and Diſtinctions are to be found but in this Book; for if this Matter was to be tried by

a Country Jury, they would certainly find againſt this Definition, becauſe an Heifer is ſtill called an Heifer amongſt Country-Men after the firſt Calf, and 'tis not that Calf, but her Age, that gives her the Denomination of a Cow.

Then as to his Suppoſition, that the Word *vacca* always ſuppoſeth a Cow which had a Calf, he muſt give me leave to ſuppoſe to the contrary, for ſome Cows are naturally barren, and never had a Calf, and yet may be comprehended by the Word *vacca*, ſo that 'tis Age, and not bringing forth a Calf which occaſions this Appellation.

2. But there was another Exception to the Bar:

If. That the Defendant had made a Title under an Indenture, and did not conclude his Plea with a profert hic in Curia, which, it was ſaid, he ought to do, becauſe he might miſrecite it, and then the Plaintiff had no Remedy.

But this Exception was not allowed, becauſe it was upon a general Demurrer; the Plea was only informal; but if the Plaintiff had demurred Specially, and ſhewed this for Cauſe, it muſt have been allowed.

* *Sid.* 308. 1 *Saund.* 8. idem.

And ſo it was held in * *Jevon's* and *Harridge's* Caſe; for as a Plaintiff when he declares upon a Bond, it muſt be with a *profert hic in Curia ſcriptum obligatorium, &c.* ſo when a Defendant pleads an Indenture, which is his Title, it muſt be with the like *profert' hic in Curia indenturam, &c.* for the Reaſon is the ſame, and therefore the Law muſt be ſo too.

Clerke verſus *Johnſon.*

Winford. Hill. 2 & 3 Jac. II. Rot. 1913.

Suffolk, If. TRESPASS againſt Sir Henry Johnſon and others, for breaking and entering the Plaintiff's Cloſe at Friſton, &c. the Writ concluded contra pacem Domini Regis hunc, and the Declaration was for a Treſpaſs by the Defendants, for breaking and entering a Cloſe called Bickling Cloſe in Friſton, 29 Septemb. 34 Car. 2.

The Defendants plead in Bar, That the Plaintiff Clerke was ſeized in Fee of Bickling Cloſe, which adjoined to the Common Field of Friſton, &c. and then ſet forth a Cuſtom for the Plaintiff and all thoſe whoſe Eſtate he had in that Cloſe, to make the Fences between the ſaid Cloſe and the Common Field; that Sir Henry Johnſon was ſeized in Fee of the Manor of Snape, &c. then he alledges a Preſcription to have Common appurtenant in the ſaid Common Field; for all Cattle, &c. but doth not ſay *levant* and *couchant*, and that the ſaid Sir Henry Johnſon in his own Right, and the Defendants as his Servants, put his Cattle into the Common,

mon, and they eſcaped into the Plaintiff's Cloſe for want of Fence, and thereupon they entered into the ſaid Cloſe, and drave them out as they lawfully might; quæ eſt eadem fractio. The Plaintiff replied de injuria ſua propria, and traverſed, that the Cattle eſcaped, &c. modo & forma as alledged in the Declaration: And upon Demurrer it was held that the Bar was ill, becauſe the Preſcription to the Common ought to be for Cattle levant and couchant.

On the other Side it was admitted, that the Plaintiff's Traverſe was good; but it was objected, that this could be no Original to warrant this Action, for it concluded contra pacem Domini Regis nunc, which was the Peace of King James, and the Treſpaſs was done in the Reign of another King; therefore the Writ ſhould have been thus concluded, viz. contra pacem noſtram necnon contra pacem *Car.* 2. nuper Regis, &c.

The Serjeant tells us this is a material Variance, and to prove it he cites 2 *Ed.* 4. 24, *placito* 23. which was thus: *ſſ.* Treſpaſs for breaking his Cloſe, and eating his Graſs 10 *Octobris Anno* 1 *Ed.* 4. The Defendant pleaded, That 6 *Jan. Anno* 39 *H.* 6. he was ſeized in Fee of the Place where, &c. and traverſed, that he was guilty *after* that Day. The Queſtion was, Whether he ought not to have traverſed that he was guilty as well *before* as *after*, becauſe (as it was objected) if he is guilty at any Time, the Plaintiff ought to recover Damages; but it was adjudged to the contrary, for if it appears by the Writ, that the whole Treſpaſs was done in the Reign of one King, ſuch a Writ can never warrant an Action for a Treſpaſs done in another Reign; but if the Fact is ſo, then the Writ ought to conclude *contra pacem* of the late King, or *continuando* the Treſpaſs from the Time of the late King, to ſuch a Day in the Reign of the preſent King, *contra pacem* of the late King, *& contra pacem Domini Regis nunc*, &c.

My *Lord Coke* diſtinguiſhes in this Matter, and tells us, That ſo it ought to be where Part of the Treſpaſs is done in one King's Reign, and Part in another; but where the whole appears to be done in a former Reign, there if you conclude *contra pacem* of that and the preſent King, 'tis Surpluſage and void; and this might be the Reaſon why the Plaintiff had Judgment in the principal Caſe; for the Serjeant tells us he had Judgment notwithſtanding this material Variance, as he calls it. 1 *Rol. Rep.* 259.

But after all, where there are ſeveral Treſpaſſes in ſeveral Reigns, if you conclude the Writ *contra pacem noſtram*, or *contra pacem Domini Regis nunc*, 'tis but Matter of Form; and the * Statute which gives a Writ of Error in the Exchequer-Chamber, upon a Judgment in the King's Bench, doth not extend to Forms in Writs; thoſe are excepted in the very Act itſelf, and ſo it was adjudged on a Writ of Error brought for this very Cauſe, † *Anno* 17 *Car.* in the Exchequer-Chamber; and yet upon another Writ of Error brought in the King's Bench upon a Judgment in the Common Pleas, for this very Fault in the Writ, the Plaintiff in Error had his Coſts, though the Writ in the Common Pleas was amended according to the Inſtructions * 27 *Eliz.* cap. 8. † *Sid.* 253. 2 *Vent.* 49.

ſtructions given the Curſitor, *contra pacem noſtram necnon contra pacem* Car. 2. *ſuper Regis, &c.*

Atkinſon & al' verſus Hunter.

Winford. Paſ. 3 Jac. 2. Rot. 559.

York, ſſ. TRESPASS by the Plaintiffs who were Infants, and brought by them per proximum amicum for killing their tame Deer.

The Defendant pleads in Bar, That he being poſſeſſed of a Term for Years in certain Lands, a ſtray Deer came thereon, and he not knowing it to be tame, killed it, quæ eſt eadem interfectio, &c.

And upon Demurrer the Court inclined, That the Plaintiffs ought to have averred in their Declaration, That the Defendant did know it to be a tame Deer, for otherwiſe it is no Fault, and therefore a Rule was made, That he ſhould amend his Declaration.

This ſeems to me to be another Nicety, for 'tis agreed on all Hands, That the *ſciens* is not traverſable, but that it ought to be proved at the Trial, upon the general Iſſue of Not guilty.

'Tis true, where an Action on the Caſe was brought againſt the Defendant, whoſe Dog had killed the Plaintiff's Sheep, *ſciens canem ſuum ad mordend' oves conſuetum*, there 'tis very probable, that Evidence may be given at the Trial, that the Defendant did *know* it, becauſe he was the Owner of the Dog, and therefore could be no Stranger to his Qualities; but the Reaſon is not the ſame in the principal Caſe, for if I kill a Deer which came on my Land, and which I never ſaw before (for that might be this very Caſe) what Evidence can be given that I *muſt know* ſuch Deer to be tame?

Oſborne verſus *Sture.*

Cooke. Trin. 2 Jac. II. Rot. 302.

Devonſh. ſſ. TRESPASS for breaking his Stable at Newton Ferrer, and taking a Gelding there.

The Defendant pleaded in Bar, That his Grandfather Philip Sture was ſeized in Fee of ſeveral Cloſes, &c. which Anno 19 Car. 1. he demiſed to Dorothy Edgecomb and her Aſſigns, for Ninety nine Years, if ſhe and Margery Upton, or either of them, ſhall ſo long live; yielding and paying 20 s. yearly; and alſo after the Deceaſe of the ſaid Dorothy and Margery, her or their beſt

Beaſt

Beaſt in the Name of an Heriot, or twenty Shillings in Money, at the election of the Leſſor or his Aſſigns; then he derives to himſelf a Title to the Reverſion, and ſets forth, That Dorothy Edgecomb married the Plaintiff, and that he was poſſeſſed of the Premiſſes in Right of his Wife, and that ſhe and Margery Upton are both dead, and the Defendant took the Gelding for an Heriot, due after the Death of Margery Upton.

The Plaintiff craves Oyer of the Indenture, which is ſet forth in hæc verba, and then demurs Specially; and for Cauſe ſhews, That it doth not appear by the Bar, that the Gelding was took upon the Lands charged with the Heriot.

And now ſeveral Reaſons were offered, why an Heriot ought not to be taken in this Caſe.

First, That an Heriot reſerved upon a Leaſe is an Heriot-Service, and by conſequence is of the ſame Nature with all other Services reſerved upon Leaſes; that is, it muſt be payable during the Term demiſed, which could not be in this Caſe, becauſe the Leaſe determined upon the Death of Margery Upton, and an Heriot is no more payable afterwards, than a Rent reſerved to be paid, after the Term is expired.

And to prove this, the Caſe of Lanyon and Carver was cited, which was: ff. Lanyon made a Leaſe to Carver for Ninety nine Years, if Carver the Leſſee, and Julian Carver, or either of them ſhall ſo long live; and the Term ſhould commence after the Death of Cecilia Carver, paying an yearly Rent, and alſo 3 l. in the Name of Heriot after the ſeveral Deceaſes of Carver the Leſſee, and Julian, and upon the reſpective Death of either of them; that Carver the Leſſee died in the Life-time of *Cecilia*, and the Queſtion was, Whether an Heriot was due upon his Death? And adjudged it was not, becauſe an Heriot reſerved upon a Leaſe is in the Nature of a Rent, which muſt go with the Reverſion. 2 Saun. 165.

But the Defendants, neither in this nor in the principal Caſe, had any Reverſion in them at the Time when they claimed an Heriot; for in the one Caſe it was before the Term commenced, and in the other, after it was ended.

But the Reaſon is the ſame in both Caſes, for if an Heriot is not payable before the Commencement of the Term, it ſhall not be paid after the Leaſe is determin'd. March Rep. 46.

That an Heriot-Service is of the ſame Nature with Rent, is thus prov'd, viz. You cannot ſeize for ſuch an Heriot, that is, you have not any Property by Service: 'Tis true, you muſt diſtrain for it, but here you can neither ſeize nor diſtrain, for the Reaſon abovementioned; the proper Remedy is Action of Covenant grounded upon the Contract between the Parties. Keilw. 82. 84. *B.*

Such an Heriot is not like that which is due to the Lord of a Manor from his Tenant in Fee, who holds of him by Heriot-Service; becauſe, let the Lord ſeize when he will, the Tenure ſtill remains.

Tho' this is very true, and needs no Proof, yet the Serjeant undertakes to prove it by Caſes which he has jumbled together, but nothing to the Purpoſe.

The firſt is in *Brook, Tit.* Heriot 5. All that is ſaid there is, That Heriot-Service is ſuch which is due after the Death of the Tenant in Fee, and there my Lords *Brook* bids us look into Title *Avowry* 81. he means the Title of his own Abridgment, where the ſame Thing is ſaid again; and this is miſtaken by the Serjeant, for he cites *Fitzh.* Title *Avowry* 81. where you will find nothing relating to this Matter.

In *Rolle's Abridgment*, Title *Diſtreſs* 672. N°. 8. 'tis ſaid a Man cannot diſtrain for Rent after the Term is expired; and my Lord *Coke's* Comment on *Littleton* is, That you cannot diſtrain for Rent due on the laſt Day of the Term, becauſe 'tis then ended. *Co. Lit.* 47. *B.*

Then as to 1 *Mod.* 216. It was in Replevin; the Caſe was, *Trevil* leaſed to *Ingram* for 99 Years, if *Joan*, *Anthony* and *John Ingram*, ſhould ſo long live, rendring an Heriot or 40 *s.* at the Election of *Trevill* or his Iſſue, after their ſeveral Deaths *ſucceſſive*.

John died firſt, and then *Joan* died; and the Queſtion was, Whether an Heriot was due on her Death? Becauſe the Courſe of Succeſſion was interrupted by the laſt Life dying firſt, and that an Heriot not being due of common Right, the Words of the Reverſion ought to be firſt ſtrictly purſued, and ſo they ſhould die *ſucceſſive*, as therein named; but the Court gave no Opinion as to that Matter, but agreed that the Avowry was ill, becauſe it did not appear that *Anthony* was alive at the Time of the Diſtreſs taken; for if he was dead, the Leaſe would be determin'd; from whence we may infer, that no Heriot would be then due.

2. **The ſecond Reaſon offer'd why an Heriot could not be ſeized was, becauſe the Leaſe was made to Dorothy Edgecomb and her Aſſigns, rendring an Heriot; and now if it might be taken after her Eſtate was determined, yet it could not be had of the Plaintiff, becauſe by his Intermarriage with the ſaid Dorothy he was only an Aſſignee in Law; but the Word Aſſigns in the Leaſe muſt be intended an Aſſignee in Fact.**

Now that the Beaſt of an Aſſignee in Fact is not liable to be taken for an Heriot, or that that of an Aſſignee in Law ſhall not, and that an Aſſignee in Fact is not liable; this Caſe was offer'd: *ſſ.* A Leaſe was made to *Robert Chicheſter* and his *Aſſigns* for 99 Years, if he and two more ſhould ſo long live, paying at the Death of the ſaid *Robert Chicheſter* and *B.* and *B. his or their* beſt Beaſt, in the Name of an Heriot, provided that no Heriot ſhall be paid upon the Death of *B.* and *B.* if *Chicheſter* ſurvive.

Chicheſter aſſign'd this Leaſe to *Skory*, and then died; the Queſtion was, Whether the beſt Beaſt of the *Aſſignee* could be taken for an Heriot upon the Death of *Chicheſter*? And adjudged it could not, becauſe the Reſervation being of an Heriot, which is collateral Matter to Rent, *&c.* therefore it is againſt common Right, and ought for that very Reaſon to be taken ſtrictly: Now the beſt Beaſt of *Chicheſter* only

only was reſerv'd to be as an Heriot upon this Leaſe, and therefore the Beaſt in which his *Aſſignee* had a Property could not be taken; becauſe ſo long as 'tis his, 'tis impoſſible it ſhould be the Beaſt of *Chicheſter*.

It was objected, that the Pronoun *their*, *viz.* (his or *their* beſt Beaſt) muſt relate to the *Aſſigns* of the Leſſee, or to nothing; And this was ſaid to be a reaſonable Conſtruction, becauſe the Leaſe being made to *Chicheſter* and his *Aſſigns*, they had the Benefit of it, and therefore ought to ſuſtain the Charge which attends it; that the Word *their* could not relate to the other two Perſons, becauſe no Heriot was to be paid upon their Deaths if *Chicheſter* was then living: But this was adjudged to be a very wrong Conſtruction, becauſe the Reſervation was not thus, *viz.* yielding and paying *after his and their Death* his *or* their beſt Beaſt; for in ſuch Caſe the *Aſſignee* might be liable; but it was yielding and paying after the Death of *Chicheſter* and the other two Perſons his or their beſt Beaſt, ſo that 'tis plain they are the Parties after whoſe Death an Heriot is limited to be paid.

I have been the longer explaining this Caſe, becauſe 'tis reported doubtfully in *Cro. Car.* and not very perfectly either by Serjeant *Hetley* or my Lord *Rolle*, who was of Counſel for the Defendant. *Hetl.* 57. *Cro.Car.* 313. 2 *Rol. Abr.* 451.

3. **There was another Objection, viz. That admitting the Beaſt of the Aſſignee might be ſeiz'd, it muſt be upon the Land charged with the Payment of the Heriot; and it doth not appear by the Plea that it was ſeiz'd on the Land; and this was the Cauſe of the Demurrer.**

In debating this Caſe three Judges held, That an Heriot-Service **may be reſerved upon a Leaſe for Lives, or upon a certain Number of Years, determinable upon the Death of A. B. C. and each of them; and in ſuch Caſe, if one dies an Heriot is due, becauſe the Leaſe is not determined, and by Conſequence there is a Reverſion, to which ſuch an** Heriot-Service **is incident.**

To prove that ſuch an Heriot may be ſeiz'd in any Place, theſe Caſes were cited.

Mich. 37 *Ed.* 3. In Replevin brought againſt an Abbot for taking an Ox. *Plowd. Com.* 96. *a.*

The Defendant pleaded, That the Father of the Plaintiff, and whoſe Heir he is, held certain Lands of him to have the beſt Beaſt after the Death of any of his Tenants in the Name of an Heriot; then alledges that the Abbot his Predeceſſor was ſeiz'd of the ſaid Lands, and becauſe the Ox was the beſt Beaſt of the Plaintiff's at the Time of his Death, he juſtified the ſeizing it for an Heriot; the Plaintiff replied, That the Place where it was ſeiz'd *was out of his Fee*: And adjudged againſt him, becauſe by this Juſtification the Defendant claimed the Beaſt as his own, which he might lawfully take wherever he found it; but if he had avowed for Damage-feaſant, or any other Treſpaſs, and claim'd no Property in it, there it had been a good Plea.

The Caſe of *Odyham* and *Smith* is differently reported in ſeveral Books.

My Lord *Anderſon* reports it thus: *ſſ.* Treſpaſs for taking an Ox; the Defendant pleads, That *Thomas Odyham* was ſeized in Fee of an Acre of Land, which he held by certain Services; *inter alia, per ſervitium reddendi*, after the Death of *any Tenant* dying ſeized, *&c.* his beſt Beaſt which he had at the Time of his Death; *A.* Tenant died.

My Lord *Anderſon* ſaid the Queſtion was, Whether a Man might *ſeize or diſtrain* for this Heriot? but doth not mention any Thing of the Place where the Seizure might be made, Whether upon, or out of the Lands charged? And he ſaid that it was adjudged he could not *ſeize*, but he might *diſtrain*; becauſe ſuch an Heriot was Parcel of the Services upon which the Eſtate at firſt was grounded, and which lay in Render, *viz. reddend' poſt mortem, &c.* and that it was the primary Intention both of the Lord and Tenant to leave the firſt Act to be done by the Tenant himſelf, *viz.* To render the beſt Beaſt.

Cro. Eliz. 590. Juſtice *Croke* tells us, That this Judgment was reverſed in *B. R.* that an Heriot-Service might be *ſeized*, becauſe where the Tenure is, That the Lord ſhall *have* the beſt Beaſt for an Heriot, there 'tis in his Election what he will take for the beſt; and there was a Diſtinction made between a Tenure of *yielding* yearly an Ox, and of *rendering* yearly his beſt Beaſt; for in the firſt Caſe 'tis on the Tenant's Election what he will *render*; and in the laſt, at the Lord's Election what he will take.

Goldſ. 191. *Moor* 540. *Goldsborough* tells us, That it might be *ſeized*, and Serjeant *Moor* ſaid that the Lord might either *ſeize* or *diſtrain*.

From which Caſes we are to collect, That if the Lord might ſeize, 'tis by Vertue of the Property which he hath in ſuch an Heriot; which being his own by Reaſon of the Tenure, he may juſtify the Seizure in any Place.

2. **To prove that the Plaintiff was ſuch an Aſſignee as is meant by the Word Aſſigns, theſe Caſes were cited.**

Dyer 6. *ſſ. Anno* 28 *H.* 8. A Leaſe was made for Years; wherein the Leſſee covenanted, That if he or his *Aſſigns* aliened the Term, that it ſhould be lawful for the Leſſor to enter.

The Leſſee made his Wife Executrix and died.

The Executrix married again, and her Husband aliened the Term.

Baldwyn, Chief Juſtice, held, That the Husband could not be comprehended under the Word Aſſigns, becauſe he had his Eſtate by Act in Law, *viz.* By his Intermarriage, and not by an Aſſignment in Fact, for that muſt be by Act of the Party; but *Brook* and *Shelley* argued, That an Aſſignment in Law is as ſtrong as an Aſſignment in Fact; for by the Marriage the Term is veſted in the Husband, or by a particular Gift of the Wife.

The next is the Caſe of *Sparke* verſus *Sparke*, which happened about the latter End of the Reign of Queen *Eliz.* but if the Reader will be ſatisfied in the Truth of that Caſe, he muſt ſearch the Roll, for it is variouſly reported in many Books, in which they not only diſagree

diſagree in that Caſe, but in the very Action it ſelf: Juſtice *Owen* tells us it was in Ejectment, Juſtice *Croke* ſays it was in Treſpaſs, and Juſtice *Yelverton* and others tell us it was in Debt; but the Caſe was thus: *ff. Michael Sparke* made a Leaſe for Life to *A.* and he made another Leaſe for 99 Years to *William Sparke*, if he ſhould ſo long live, which was to commence after the Death of *A.* and that if the ſaid *William ſhould die within that Term*, that then the Lands ſhould remain to his *Executors or Aſſigns* for *twenty-one Years* after the Death of the ſaid *A.* and *William Sparke*.

Owen 125. *Cro. Eliz.* 658. *Yelv.* 9. *Noy.* 32. *Moor* 666. 2 *Rol. Abr.* 47.

A. died, and *William Sparke* made a Leaſe of the Lands for twenty-one Years, rendering Rent, and died inteſtate.

His Wife *Grace Sparke* adminiſtred to him, and brought an Action of Debt for Rent arrear upon the Leaſe made by her Husband.

Mr. Attorney *Noy* ſays the Action was well brought in the *Detinet* by the Adminiſtratrix, but gives no Reaſon for it; but Juſtice *Yelverton* reports quite contrary, *viz.* That it was the Opinion of *Gawdy* and himſelf that the Action would not lie, becauſe this Term of twenty-one Years was only a Poſſibility in the Original Creation, which was to come to the Executors or Aſſigns of *William Sparke*, if he ſhould not out-live 99 Years; but if he ſhould live ſo long, which could not be well preſumed, then it would not ariſe at all.

If therefore the *Executors or Aſſigns* of *William Sparke* had only a contingent Intereſt, and he himſelf had none in the Term of twenty-one Years, by Conſequence his Adminiſtratrix could have none from him.

But if ſhe had any Manner of Title it muſt be by Purchaſe from *Michael Sparke* the firſt Leſſor; and that ſhe could not have, becauſe ſhe was not a Party to the Leaſe for 99 Years.

So that there being none to take by the Word Executors, the next Queſtion was, Who might take by the Word *Aſſigns?* That is, Whether an Adminiſtratrix was an Aſſignee in this Caſe? Juſtice *Owen* tells us, That it was the Opinions of my Lord *Anderſon*, *Walmeſly* and *Glanvil*; that an Adminiſtratrix is not an Aſſignee, becauſe ſhe comes in by an Act of a Stranger, *viz.* By the Ordinary; and by the Word *Aſſigns* ſuch only is meant which comes in by the Act of the Party, *viz.* by an Aſſignment in Fact from him; which is contrary to the Purpoſe for which 'tis cited by our Reporter: And he likewiſe diſagrees with almoſt all the other Books; for he tells us, the Term of twenty-one Years veſted in the Inteſtate in his Life-time, and that his Adminiſtratrix ſhould hold it.

Cro. Eliz. 26. contra. 1 *And.* 123. idem.

In *Goldſ.* 186. there is nothing like this Matter; ſo that muſt be a Miſtake.

But the Caſe of *Scory* and *Randall* before mention'd, (and as 'tis reported by my Lord *Rolle*) being a direct Authority, that where a Leaſe is made to *C.* and his Aſſigns, paying an Heriot-Service at his Death, in ſuch Caſe the Beaſt of the Aſſignee *in Fact* of *C.* ſhall not be taken; the Serjeant gives it this Anſwer, *viz.* That what my Lord *Rolle* reports is not warranted by the Report of the ſame Caſe by Juſtice *Croke*, from which, if he would infer any Thing, it muſt

be, That becauſe it is right in Juſtice *Croke*, therefore it muſt be wrong in my Lord *Rolle*: Is not this an admirable Conſequence? But what if they ſhould be all miſtaken, as it very often happens? Only this I muſt obſerve, That Juſtice *Croke* ſpeaks very doubtfully, and ſcarce intelligible in this Matter; and therefore I muſt agree that our Reporter is ſo far right, becauſe he is not to be underſtood whether he is in the wrong or not.

But as to the principal Point, Whether an Heriot might be ſeized upon the Death of Margery Upton the Court was divided; for two of the Judges held, That an Heriot was due upon her Death, and that the Defendant had a reverſionary Intereſt by the very Leaſe it ſelf in that Inſtant of Time, and that the Seizure ſhall relate to that Time.

But the other Judges were of a contrary Opinion; for by the Words of Reſervation in the Leaſe, the Heriot was to be paid not upon, but after the Death of the Leſſee, and that the Defendant could not then be entitled to an Heriot, becauſe the Leaſe was determined by the Death of the Leſſee, and by Conſequence there could be no Reverſion in the Defendant at the Time when the Heriot was to become due, and payable by the Leaſe.

And for this Difficulty the Caſe was adjourned into the Exchequer-Chamber, where Mr. Pollexfen argued, That admitting this to be an Heriot-Service, yet there could be no Seizure for it, becauſe 'tis a caſual Service, and ſhall be extended no further than a Reſervation of Rent, as a Capon, or any particular Thing, and yet for ſuch Things the Leſſor cannot ſeize.

All the Books that mention Seizures for Heriots are between Lords and Tenants; and tho' ſuch a Privilege may be annexed to ancient Tenures, 'tis no Argument that it ſhall be ſo upon Reſervations in Leaſes; for ſince the Statute of Quia emptores terrarum, no new Tenures can be created.

'Tis by the Reſervation that the Duty is created, and which ſhall not be enlarged further than the natural Import and Senſe of the Words themſelves will carry it.

Cro. Eliz. 217. 1 *And.* 261. And therefore *Anno* 33 *Eliz.* in *Richmond* and *Butcher*'s Caſe it was adjudged, That when a Leaſe is made for Years, rendering Rent to the Leſſor, his Executors and Aſſigns, *during the Term*; that tho' the Rent is a Thing which is properly incident to the Reverſion, and goes to the Heir, yet it being reſerved to be paid to the *Executors and Aſſigns* of the Leſſor *during the Term*, the Heir ſhall not have it.

'Tis true, this Caſe has been ſince denied to be Law, becauſe they ſay it was grounded upon a Miſtake of the Year-Book 12 *Ed.* 2. and this ariſes upon a *Nota* of Juſtice *Croke*, at the End of his Report of that Caſe, *viz.* That the Judges relied upon a Book ſhewed to them in Writing in 12 *Ed.* 2. where he ſays it was ſo adjudged.

1 *Vent.* 162. My Lord *Hale* tells us this muſt be a Miſtake, for he cauſed the Manuſcript Report of *Ed.* 2. in *Lincoln's-Inn* Library to be ſearched on this Occaſion, and that no ſuch Caſe could be found; Juſtice *Croke*

Croke was ſo cautious as not to put the Caſe at large, which it ſeems he could not very well do, becauſe there is no ſuch in that Year; and yet Juſtice *Owen* tells us what it was, *viz.* A Leaſe was made for Years, rendring Rent to the Leſſor and his Aſſigns, this Rent is extinct by the Death of the Leſſor; for the Aſſignee cannot have it, becauſe not privy to the Reſervation, *Owen* 9. Now tho' he was miſtaken in the Caſe, yet I think he could never miſtake it for the Year-Book 12 *Ed.* 3. which is in *Fitzh. Abr.* Title *Aſſize* 86. becauſe the Caſes differ ſo much; for that is, A Man ſeized in Fee made a Leaſe for Years, rendring Rent to the Leſſor and his Heirs, and made another Leaſe of more Lands, rendring Rent to himſelf, omitting the Word Heirs; it was held that the Heir ſhall not have the laſt Rent, but that 'tis extinct by the Death of the Leſſor.

My Lord *Hale* tells us further, That a Reſervation *ex vi Termini*, can be nothing elſe but a Reſervation of ſomething in Lieu of what paſſed away from the Leſſor, which muſt therefore be carried over to the Perſon who would have ſucceeded in his Eſtate, if no Leaſe had been made; and that for this very Reaſon Reſervations have been uſually conſtrued according to Reaſon and Equity.

Sympſon verſus *Merrits.*

B. R. Hill. 3 & 4 Jac. II. B. R.

Suffolk, ff. IN Treſpaſs, &c. The Defendant juſtified by a Pro-ceſs out of the Hundred-Court, viz. That King Charles II. was ſeized in Fee of the Hundred of Babergh, and ſo preſcribes to have a Hundred-Court there; that he granted the Hundred to the Queen Dowager for Life; that a Plaint was levied there by the Plaintiff againſt the now Defendant, but that the Defendant had Judgment, and thereupon a Levari facias was awarded to ſeize the Plaintiff's Goods, directed to the other Defendants, by Vertue whereof they were ſeized, &c.

There was a General Demurrer to this Plea, which appears to be drawn by Serjeant Holt, and the Demurrer by Mr. Pollexfen; which is all that is material in the Caſe.

Dale

Dale verſus *Phillipſon* & al'.

Tempeſt. Hill. 3 & 4 Jac. II. Rot. 1536.

Lincoln, ff. TRESPASS for breaking his Cloſe, and chaſing his Cattle (but did not ſay what Sort of Cattle) and for taking and carrying away three Heifers ipſius Johannis Dale.

The Defendant Phillipſon pleaded Not guilty, and the other Defendants juſtified by Vertue of a Replevin, ſetting forth, That Phillipſon was poſſeſſed of the Heifers (but did not ſay ut de bonis ſuis propriis) and that the Plaintiff got them unlawfully into his Poſſeſſion, and that Phillipſon complained to the Sheriff of Lincoln (but did not ſay where) who made a Warrant (but did not ſay in Writing) by which he commanded the Defendant to replevy the Cattel, &c.

Upon Demurrer to this Plea, the Exception taken to it was for the Faults above-mentioned; beſides, the Plaintiff brought the Action for taking his Cattle, and the Defendants had juſtified the taking the Cattle of Phillipſon, which is no Manner of Anſwer to that Part of the Declaration.

But then it was objected that the Declaration was ill, becauſe the Plaintiff had not ſet forth the Species of the Cattle: The Court gave no Opinion on either Side, but the Parties agreed to amend; and there was no Book cited in this Caſe.

Palmer verſus *Barfoot*.

Winford. Hill. 3 & 4 Jac. II. Rot. 1832.

Midd. ff. TRESPASS for taking 1000 ſpiced Cakes at Weſtminſter on the 20th of Feb. 2 Jac. II. and 800 more on the 20th of Feb. 3 Jac. II.

The Defendant pleads in Bar, and ſets forth a Cuſtom in the City of London to chuſe ſix Freemen of the Baker's Company every Year in the Halimote-Court to inſpect all ſpiced Cakes and Bread brought to the common Markets of London that Year by Foreigners, and expoſed to Sale; and if they find any made of bad Wheat, or not full Weight, or deceitfully made or baked, then they uſed to ſeize and ſend it to the City Priſons, for the Uſe of the Priſoners there.

That the Defendant was choſe and ſworn an Inſpector, &c. That the Plaintiff being a Foreigner, brought Cakes half baked to Stock's-Market, and expoſed them to Sale; and that the Defendant upon

Inſpection, found them not baked, and ſo ſeized them, &c. and traverſed, that he was guilty at Weſtminſter, or in any other Place out of the City of London, &c.

And upon Demurrer it was objected,

ſſ. 1. That he ſhould have traverſed that he was not guilty out of the Markets of London.

2. That the Cuſtom alledged, is to chooſe ſix Bakers, &c. Then he ſhews that he was choſen, but doth not ſet forth that any more were elected.

3. The Cuſtom is to ſeize Bread ill baked, and the Defendant hath juſtified the ſeiſing Cakes.

4. But the chief Objection was, That the Defendant had ſet forth, That by inſpecting the Cakes, he found them to be ill baked, which is not a poſitive Averment they were ſo; and for this Reaſon the Plaintiff had Judgment.

And this Judgment is well warranted by Sir *Baptiſt Hicks*'s Caſe, * 2 *Cro.* 390 which was thus: ſſ. In an Action of Covenant the Plaintiff ſets forth, That he bought a Wood, which by computation was three hundred Acres, and for which he paid the Defendant 2500 *l.* being 100 *l. per* Acre; and that it was covenanted between them, that each ſhould appoint a Meaſurer at ſuch a Time, and if the Acres were more or leſs than three hundred, that then the Money ſhould be paid either to the Defendant, or repaid by him to the Plaintiff proportionably; that the Plaintiff appointed a Meaſurer, and that *it appeared* unto him upon the Meaſuring it, that there wanted Seventy Acres, which amounted to 750 *l.* for which the Action was brought, and the Plaintiff had Judgment; and upon a Writ of Error it was objected, That the Plaintiff had not alledged in Fact, that there wanted ſeventy Acres, but that *it appeared ſo* upon Meaſuring, which might be true, and yet the Defendant ſhould not repay ſo much, becauſe it might not be meaſured right.

But now to ſhew his Skill in Pleading, the Serjeant hath found out another Exception to this Plea.

ſſ. The firſt Part of it is a Juſtification of the Treſpaſs done on both thoſe Days, in which they are alledged to be done by this Declaration, but afterwards he juſtifies only that which was alledged to be done on the firſt Day, and ſays nothing to the Treſpaſs on the ſecond Day; but inſtead thereof he traverſed that he was Guilty ad aliquod aliud tempus; which the Serjeant tells us is repugnant.

If there is any Thing in this Exception, it muſt be thus: ſſ. The Defendant pleads Not guilty as to the taking *vi & armis*, and as to the *Reſidue* of the ſuppoſed Treſpaſs, he pleads in Bar, and ſets forth the Cuſtom, *&c.*

Now the *Reſidue* of the Treſpaſſes muſt comprehend that which was alledged to be done on both the Days ſet forth in the Declaration.

Then in the latter Part of his Plea, the Defendant *ulterius dicit*, that on the 20th of *Feb.* 2 *Jac.* 2. (which is the firſt Day mentioned in the Declaration) the Plaintiff brought Cakes to the Market, *&c.*

which being ill baked, the Defendant *die & anno præd'* ſeized, &c. and then traverſes that he was guilty *ad aliquod aliud tempus.*

Now I would fain know how this Traverſe is repugnant, or wherein the Force of this Exception lies; for there are two Treſpaſſes alledged to be done on ſeveral Days, and the Defendant juſtifies the Treſpaſs done on one of the Days, and traverſes that he was guilty *ad aliquod aliud tempus*, which muſt be an anſwer to the Treſpaſs alledged to be done on the other Day.

And here I cannot chooſe but to recollect, that what is called good Pleading, anſwers Part of that Character which my Lord *Coke* long ſince gave it, *viz.* that it is the moſt *profitable* Part of the Law; for when Men torture their Inventions to find out Niceties, and to raiſe ſuch frivolous Objections in Pleading, as a wiſe Man would be aſhamed to mention, (as in this very Caſe where it was objected, that *Cakes* were not *Bread*) ſuch Things I ſay may make Pleading *profitable* to the Lawyers, but I think it doth not anſwer the other Part of the Character given by Lord *Coke*, (that is) it is not commendable.

Osbuſton verſus *Fames* & al'.

Winford. Paſ. 4 Jac. 2. Rot. 468.

Suffolk, ff. TRESPASS for taking two Lambs at Felſham.

The Defendant pleads in Bar, That before the ſuppoſed Treſpaſs, &c. King James I. in the ſixth Year of his Reign, granted two Fairs to William Risby and his Heirs, to be held every Year in his Manor of Maydenhall in Felſham, with all Toll to thoſe Fairs belonging or accuſtomed.

That a Fair was held there 5 Auguſti, and that the Plaintiff bought ſix hundred Sheep and Lambs there, for which he was to pay 6 s. for Toll, and had Notice of it; and upon his Refuſal to pay it, the Defendant as Servant to John Risby, diſtrained the two Lambs for Toll, and took and carried them away; then he avers, That ſix Shillings was a reaſonable Toll, and alledges a Cuſtom to diſtrain for it.

The Plaintiff replied, That he lived in Thaxted in Eſſex, which is within the Dutchy of Lancaſter; and that all the Inhabitants within the Dutchy Liberties are diſcharged from paying Toll throughout England, of which the Defendant had Notice, and ſo de injuria ſua propria he took the Lambs; and upon Demurrer it was objected,

1. That the Plea doth not ſet forth, That any Toll was granted by expreſs Words; and if there is no ſuch Grant, then 'tis not due by Law.

For

For 'tis not incident to a Fair or Market that Toll ſhould be taken; 'tis a Thing of private Benefit and Intereſt to the Patentee; and therefore it muſt be expreſly granted.

But in this Caſe 'tis granted, as belonging or accuſtomed to a Fair: Now Toll is in no ſort belonging to a Fair, for, as it hath been already obſerved, 'tis not incident to it; and it cannot be ſaid that it hath been accuſtomed to be paid, unleſs in a Fair held by Preſcription, which the Defendant ought to have avetred.

2. The Defendant ſets forth, That he did take and carry away the Lambs, but did not ſay nomine diſtrictionis.

'Tis true, that when a Cuſtom or Preſcription is alledged to diſtrain, there you cannot juſtifie the *taking and carrying away*, unleſs it appear that the Thing was *diſtrained*, becauſe it doth not meet with the Preſcription if 'tis not a Diſtreſs; and ſo it was adjudged in * *Smith* and *Sheppard's* Caſe, where a Preſcription was alledged for a *Toll through*, and to diſtrain if not paid; and the Defendant juſtified the taking, but it did not appear that it was diſtrained. * *Cro. Eliz.* 710.

But that differs from this Caſe, for here the Defendants ſet forth, That they *diſtrained* the Lambs for Toll which they *took and carried away*; and if they had ſaid *nomine diſtrictionis*, it had been only to repeat the ſame Thing which was alledged before.

There was no Objection made, either to the Declaration or Replication; both which were agreed to be good; and therefore the Serjeant tells us, That *though* the Bar was not good, I think it had been more proper to ſay, That becauſe the Bar was not good; for the firſt Exception the Plaintiff had Judgment.

Rodoway verſus *Lowder* & al'.

Cooke. Paſ. 4 Jac. II. Rot. 310.

Berkſhire, ſſ. TRESPASS for breaking and entering her Houſe at Abingdon, and taking away bona & catalla ſua, not expreſſing what they were, &c.

The Defendants juſtifie by Vertue of a Writ of Habere facias poſſeſſionem directed to the Sheriff, upon a Judgment in Ejectment, at the Suit of Adam Wincheſter, who was Leſſor of the now Defendant Lowder, by which the Sheriff was commanded to put the ſaid Wincheſter in Poſſeſſion; that he made a Warrant directed to the Defendants and others, by Vertue whereof they entered into the Houſe, to deliver Poſſeſſion as the Writ required; and that they took the Goods out of the Houſe, and put them in the Highway; and deſired the Plaintiff to go out, which ſhe refuſed, whereupon the Defendant molliter manus impoſuit to turn her out; and that ſhe de injuria ſua propria aſſaulted him; and ſo juſtifies in his

own Defence; and traverſed, that he was guilty of any Treſpaſs, either before the Warrant, or after the Return of the Writ.

The Plaintiff replied de injuria ſua propria, without traverſing any Thing alledged in the Plea; and without ſaying abſque tali cauſa.

And upon Demurrer to this Replication it was held to be ill, becauſe the Plaintiff had alledged, That the Treſpaſs was done by the Defendant de injuria ſua propria, which in no Caſe is a good Iſſue without thoſe Words abſque tali cauſa.

But in this Caſe the Writ of Poſſeſſion, or the Warrant upon it ought to be traverſed according to * Crogate's Caſe, as the Book tells us.

* 8 Rep. 66. B.

But he who looks into that Caſe, will find that *de injuria ſua propria* is a good Plea in many Caſes, without thoſe Words; and that there was not any Writ or Warrant to be traverſed in that Caſe; it was ſhortly thus: *ff.* In Treſpaſs, *&c.* the Defendant pleaded, That an Houſe *&c.* in *Baſingham*, was Copyhold and Parcel of the Manor of *Thurgarton*; and that the Biſhop of *Norwich* was ſeized in Fee of that Manor in Right of his Biſhoprick; and ſo preſcribes to a Right of Common for the Biſhop, and his Copyhold Tenants of the ſaid Houſe, in a great Piece of Paſture called *Baſingham Common*, *&c.* that the Biſhop granted the ſaid Houſe to *W. M.* that the Plaintiff put his Cattle into the ſaid Common, and that the Defendant as Servant to the ſaid *William*, and *by his Command*, *molliter* drove the Cattle out of the Common, *&c.*

The Plaintiff replied *de injuria ſua propria abſque tali cauſa*; and upon Demurrer one Queſtion was, Whether the Words *abſque tali cauſa*, ſhall relate only to the Command, or to the whole Plea; And it was adjudged, That they ſhall relate to the whole Plea, and there being many Affirmatives in it, *viz.* That the Houſe was Parcel of the Manor, *&c.* that it was Copyhold; that the Defendant had Common by Preſcription: All thoſe would have been put in Iſſue, if this Replication ſhould be allowed; therefore it was held ill, for the Iſſue ought to be upon a ſingle Point, and the reſt ought to be traverſed.

Then it tells us where *de injuria ſua propria* generally, is a good Plea, and where 'tis not, *viz.* it is a good Plea where it comes only by way of Excuſe to an Injury alledged to be done to the *Perſon* of the Plaintiff, as Battery, Impriſonment, Scandal or the like; or where a Defendant juſtifieth in the Defence of his Poſſeſſion, if the Title and Intereſt doth not come in Queſtion.

But that which is like the principal Caſe, and which is no Part of *Crogate*'s Caſe, but only mentioned there; was thus: *ff.* If in Falſe Impriſonment the Defendant juſtifies by a *Capias* and Warrant upon it, there *de injuria ſua propria* generally, is not a good Replication, becauſe Matter of Record and Fact would by this Means be put in Iſſue; therefore in this Caſe the Plaintiff ſhould have replied *de injuria ſua propria, &c.* and traverſed the Warrant, which

is Matter of Fact; and for this Reaſon the Defendant had Judgment.

There was an Exception to the Bar, but it was grounded upon a Miſpriſion; and therefore I think it not worth the repeating.

And now the Serjeant by two *Note's* of his own, would have the Reader obſerve what Faults he could find in the Pleadings on both Sides.

1. That the Declaration was ill, becauſe it doth not ſet forth what Goods were taken away, but *bona & catalla* generally.

But if he was in earneſt, Why doth he put a *Quære* to it, and refer us to his own Book to be reſolved in it, *viz.* in *folio* 1493. where the Declaration was for taking *quatuor pullas*, without adding the *Engliſh*, for *pullus* ſignifies the Young of any Thing? But the Defendant in that Caſe juſtified the taking them; which is a ſufficient Demonſtration that he did know what they were; and ſo 'tis in the principal Caſe, where the like Juſtification was made.

Then he finds fault with the Plea, becauſe 'tis alledged, That the Defendant entered the Houſe to deliver Poſſeſſion *ſecundum exigentiam Brevis*, which muſt be to *Wincheſter* the Leſſor of the Plaintiff; and that by the Command of *Wincheſter*, he took the Goods out of the Houſe; but doth not ſay that he did actually deliver Poſſeſſion to him.

I cannot ſee what Occaſion there is for it, becauſe when he had ſet forth, That he entered into the Houſe to deliver Poſſeſſion *ſecundum exigentiam brevis*, that muſt be to *Wincheſter*, and the Poſſeſſion of a miniſterial Officer, by Vertue of an Execution is the Poſſeſſion of the Party, at whoſe Suit the Judgment was obtained.

Gardner verſus *Peyton* & al'.

Tempeſt. Trin. 4 Jac. II. Rot. 629.

Glouceſter, II. TRESPASS for entering her Houſe, and taking her Goods, naming them, &c.

The Defendants began their Plea informally, for they did not ſay ven' & defend', but only vim & injuriam, &c. then they juſtifie by Vertue of a Sci. fa. againſt the Goods of one Dunn, at the Suit of Turner; and a Warrant upon it, by which they entered the Houſe, and took the aforeſaid Goods; and upon Demurrer the Plaintiff had Judgment.

1. Becauſe the Defendants did not appear, for they had left out the Words ven' & defend', &c. which ſhould have preceded vim & injuriam.

2. They juſtified the entering the Plaintiff's Houſe, by Vertue of an Execution againſt the Goods of Dunn; and have not averred that thoſe were his Goods which were taken there.

I think it appears by the Plea, That *Dunn*'s Goods were taken there, for the Plaintiff declared for taking *bona & catalla ſua*, the Defendant juſtified by Vertue of an Execution againſt the Goods of *Dunn*, and a Warrant upon it, by which the Defendant was commanded to levy the Debt *de bonis & catallis* of *Dunn*; that he entered the Houſe of the Plaintiff, and took *bona & catalla prædicta*: Now what other Goods can be intended to be taken there, but the Goods of *Dunn?*

But it ſeems if the Defendant had averred, That the Goods taken there, were the Goods of Dunn, that had not been ſufficient, without he had alledged that they came wrongfully to the Plaintiff's Poſſeſſion, or ſhewed ſome other Matter by which he might juſtifie the entering the Houſe.

Cro. Eliz. 242. As for Inſtance. *If.* In Treſpaſs for entering his Houſe, and taking away *his Goods.*

The Defendant pleads, That before the Treſpaſs, the Property of thoſe Goods was in *B.* and that he ſold them to the Defendant who demanded them, but they were not delivered to him; and thereupon he entered the Houſe by the Leave of the Plaintiff's Wife, and took the Goods; and upon Demurrer the Plaintiff had Judgment, becauſe it did not appear how the Goods came to the Plaintiff's Houſe, either *wrongfully* or otherwiſe; for if not *wrongfully*, then the Defendant cannot enter to take them.

Cro. Eliz. 329. And therefore, where Treſpaſs was brought for taking *quædam averia*, but did not ſay *ſua*, the Defendant pleaded, That they were his Cattle; and that a Stranger *wrongfully* put them into the Plaintiff's Cloſe, and by his Conſent, and that the Defendant finding them there, did retake them; and this was held a good Plea, becauſe the Goods being taken *wrongfully* from the Defendant, he might lawfully retake them where-ever he finds them.

But in the Caſe laſt mentioned 'tis to be obſerved, that the Plaintiff claimed no Property in the Cattle, for he did not ſay they were *ſua*, which differs from the principal Caſe, for there the Plaintiff declares for taking *bona & catalla ſua.*

All that can be collected from theſe Caſes is, That where Goods are out of the Poſſeſſion of the Defendant, not by his own Delivery, but by the *wrongful* taking of another, he may alledge this Matter in his Plea, and juſtifie the taking his own Goods any where; but it doth not follow from thence, that a Plea would be bad where the Defendant juſtifies an Entry and Taking, *&c.* merely becauſe he did not ſet forth that the Goods were wrongfully taken from him; becauſe there may be ſome other Matter pleaded, which may not only be an Excuſe, but may juſtifie his Entry and Retaking his Goods.

But my Lord *Rolle* will not admit, That a Man may juſtifie the entring and taking his Goods, though it doth appear that they were *wrongfully* taken from him, unleſs it was likewiſe *feloniouſly* taken; and therefore, where in Treſpaſs the Defendant ſet forth, That ſome Apple-Trees were *ſtolen*, rooted up and carried to the Plaintiff's Houſe,

2 Rol. Rep. 55. *2 Rol. Abr.* 564. idem.

Houſe, where he found them, and ſo juſtified the entring and retaking them; and upon Demurrer the Plaintiff had Judgment, becauſe a Man cannot juſtifie the entring and ſearching another Perſon's Houſe, unleſs 'tis for ſtolen Goods: Now it appeared by that Plea, that the Trees were *wrongfully* taken from the Defendant, but not *felonioufly*, becauſe they were rooted up and carried away at the ſame Time.

Danby verſus *Hodgeſon.*

Cooke. Paſ 3 W. & M.

Yorſhire, ſſ. TRESPASS for breaking his Cloſe, and digging and carrying away four Load of Stones, and converting them to his Uſe.

The Defendant pleads, That he was ſeized in Fee of a Meſſuage, &c. and preſcribes to enter the ſaid Cloſe, and dig for Stones there to repair his Houſe and Fences; then he ſets forth, That his Houſe was in Decay, and that he did enter, &c. and dig and carry away Stones to repair the ſame; and upon Demurrer,

It was held that this was an ill Plea, becauſe the Defendant did not alledge, That he uſed the Stones to repair his Houſe or Fences, or that he kept them for that purpoſe; for probably he might dig them to repair, &c. and might afterwards alter his Mind, and ſell them; and that would be a Converſion.

We are told this Caſe is reported by Serjeant *Levinz*, but that he did not mention the Caſe of * *Eaſt* and *Harding*, which was an Ejectment brought for the Forfeiture of a Copyholder, by cutting down two Elms; and upon Not guilty pleaded, it was found Specially, That there was a Cuſtom for Copyholders to fell Timber for Repairs, and that the Defendant's Houſe wanted repairing at that very Time he cut the Elms; and that after the Action brought, he had *uſed one* for that purpoſe, and that the other lay ready *ad reparationem faciend'*. 3 *Lev.* 323. * *Cro. Eliz.* 498.

Juſtice *Croke*, who reports this Caſe, tells us, The Judges upon arguing this Special Verdict, were not agreed whether this was a Forfeiture or not, becauſe it was found, That the Trees were neceſſary for Repairs; and that the Defendant cut them for that *Uſe*.

But Serjeant *Moor* who reports the ſame Caſe, and who was of Counſel for the Plaintiff, poſitively affirms, that cutting Timber is a Forfeiture, if it doth not appear that it was *uſed for Repairing*, which comes near this very Caſe. *Moor* 492.

Another

Another Reaſon why the Plaintiff had Judgment was, becauſe the Defendant did not alledge, That *he kept the Stones to repair his Houſe.*

* *Cro. Eliz.* 593. But there is a Caſe which proves, That ſuch an Allegation had not been ſufficient. *ff.* It was an Action of Waſte, for felling three hundred *Oaks.*

The Defendant as to *two hundred* of the ſaid Oaks, pleads, That his Houſes were in Decay, and that he felled thoſe Oaks to repair them; and that he *kept the other Hundred to repair, &c. tempore opportuno*; and upon Demurrer this was held an ill Plea, becauſe if a Man might fell Timber and *keep it for Repairing*, he may fell all on the Land, when there is no Occaſion of Repairing.

Fletcher verſus *Fiſher.*

Tempeſt. Trin. 3 W. & M.

Cumberland, ff. TRESPASS for cutting and carrying away two Oaks at Seckmurthey, 20 Julii, 2 W. 3. and converting them to his Uſe.

The Defendant pleads Not guilty to the Converſion, and to the reſt he pleads, That one Barwis was ſeiz'd in Fee of the Manor of Seckmurthey, and that there was a Cuſtom for the Lords thereof, to grant Eſtates for Lives, by Writing ſealed, or otherwiſe ſigned only, and not ſealed, &c.

That the ſaid Barwis granted the Lands to the Defendant, by a Writing, but not ſealed; Habendum for the Lives of the ſaid Lord and Tenant, and that Barwis died.

Then he ſets forth another Cuſtom for the Tenants, &c. to cut Oaks growing on their Lands to repair the Buildings, &c.

That at the Time of the ſuppoſed Treſpaſs, an old Barn was in great Decay, and that the Defendant cut the Oaks for the neceſſary Repairing thereof, which he kept for that Purpoſe, and in convenient Time applied to that Uſe.

There was a Demurrer to this Plea, but it was never argued.

Now leſt it ſhould paſs *ſub ſilentio*, as the Lawyers call it, the Serjeant has obliged us with his Obſervations. *ff.* That 'tis a very ſtrange Way of paſſing Eſtates by Writings not ſealed, but yet it was generally allowed in the *North* of *England.*

3 *Bulſtr.* 230. That there are ſome other unuſual Methods of conveying Eſtates; as where a Man declared that he was ſeized in his Demeſne as of Fee, *ſecundum conſuetudinem manerii*, and being ſo ſeized, did ſurrender; by which it appears, That there may be a Cuſtom to *Surrender* Land held in Fee-ſimple.

So where a Man declared, That he was ſeized of a Meſſuage, Parcel of the Manor of *Wakefield*, by Copy of Court-Roll in *Fee-ſimple*, according to the Cuſtom of the ſaid Manor; this was held good likewiſe in the *North*. *Lut.* 1 Vol. 125.

3. Another Obſervation is, That this Eſtate was granted by the Lord of the Manor during the Lives of him and his Tenant, and yet if the Lord die, the Tenant ſhall ſtill hold it, unleſs there is a Cuſtom to the contrary.

And to prove this, the Serjeant bids us look into *Roſſe*'s Caſe, which is reported in ſeveral Books; ſome of them differ in the Action, as my Lord *Coke* and Serjeant *Moor* ſay it was in Ejectment, but Juſtice *Croke* tells us, it was in Treſpaſs only; however, they all agree in the Fact, which was thus: *ſſ.* A Leaſe was made to *A.* during his *own Life*, and the Lives of *B.* and *C.* and the Queſtion in Law was, Whether this Limitation during the Lives of *B.* and *C.* was good? Becauſe an Eſtate for his *own Life*, being of a higher Nature than an Eſtate for the Life of another, therefore both thoſe Eſtates cannot ſtand together, but one muſt drown in the other. 5 *Rep.* 13. *Cro. Eliz.* 491. *Moor* 398. *Goldſ.* 157.

But it was adjudged to be one entire Eſtate and Freehold, which ſhould have a Continuance during the three Lives, and the Survivor of them; and though the Leſſee could have it no longer than for his own Life, yet his Aſſignee would have the Benefit of it ſo long as the other two were living; and if he ſhould not aſſign it, an Occupant might have it after his Death. *Moor pl.* 32.

But the Serjeant himſelf ſeems to be of Opinion, That ſuch Eſtates continue only during the joint Lives of the Lord and Tenant, by the Cuſtom of ſeveral Manors in the North; and that upon the Death of either, the Lord is intitled to a new Fine upon a new Admittance.

3. The Cuſtom is for the Tenants to fell Oaks growing upon their reſpective Lands; but the Plea hath not purſued that Cuſtom, becauſe it did not appear where thoſe Oaks did grow, which the Defendant cut.

4. It doth not appear that the Defendant uſed the Timber for Repairs, in any convenient Time after it was felled, and before the Action brought; for the Treſpaſs was alledged to be done 20 Julii, 2 W. which was in the Year 1690; and the Record was of Trinity Term 3 W. and the Defendant had juſtified the Treſpaſs on the ſame Day on which it was laid in the Declaration.

Therefore the Serjeant puts a *Quære*, Whether the Plea is not ill for that Cauſe? For there ſeems to be a whole Year between the felling the Timber, and uſing it.

Now if the Serjeant had look'd into the Caſe of *Eaſt* and *Harding*, which is reported in ſo many Books, and which he mentioned himſelf in the very Caſe before this, he would not have made this *Quære*, or if he had, there he might have it reſolved. *ſſ.* In that Caſe it appeared, That the Timber was felled 32 *Eliz.* to repair the Houſe, *Cro. Eliz.* 498.

&c. but it was not *uſed* in five Years afterwards; and this was held well enough in reſpect to the Time; and a very notable Reaſon was given for it, *viz.* That the Timber might be ſo long in Seaſoning.

But there was no manner of Colour for this Obſervation or Objection; (call it which you will) for common Experience tells us, That 'tis a *convenient Time* to uſe Timber a Year after 'tis felled; though five Years is ſomething extraordinary for Seaſoning it.

5. The laſt Obſervation is, That this Plea begins with Not guilty as to the Converſion to his own Uſe; and yet he juſtifies the applying the Timber to repair his Barn, which muſt be a Converſion to his own Uſe, at leaſt during his own Life, but juſtifiable by a Cuſtom; ſo that he ought to have ſaid nothing to the Converſion, becauſe 'tis alledged only by way of Aggravation of Damages; as in Treſpaſs for taking his Goods, and converting them to the Defendant's Uſe; theſe are not diſtinct Actions, viz. Treſpaſs and Trover, becauſe the Converſion is only alledged to aggravate the Damages.

So if the Writ is for a Treſpaſs and Falſe Impriſonment, and the Declaration is for an Impriſonment until he paid a Fine, this is no Variance, becauſe theſe Words are added only to aggravate the Damages; for paying a Fine is but the Conſequence of an Impriſonment.

Cundall verſus *Hodgſon.*

Cooke. Trin. 4 W. & M. Rot. 314.

Yorkſh. ſſ. TRESPASS for immoderately beating, wounding and chaſing a Horſe, 1 Septemb. and for beating three Horſes 5 Septemb. Anno 3 W. at Rippon.

The Defendant pleads, That the locus in quo, &c. (though no Place certain but Rippon only was named in the Declaration) was called Spelltriggs in Rippon; and that it was his Freehold; and becauſe the Horſes were there Damage-Feſant, he juſtified the driving them out, and ſtriking them with a little Stick, doing little Damage.

The Plaintiff replied, That de injuria ſua propria the Defendant did graviter & immoderate ſtrike the Horſes, but did not ſay apud Rippon præd', and thereupon they were at Iſſue; and as to the Plea in Bar he replied præcludi non, &c. for that he himſelf was ſeized in Fee of a Meſſuage, &c. in Rippon, and ſo preſcribes to have Common in Spelltriggs, for a certain Number of Horſes,

&c. and juſtifies the putting them into the Common; and as to the beating and wounding, it was de injuria ſua propria; and traverſed that the Doves were Damage Feſant.

And upon a Special Demurrer, becauſe the Replication was multiplex, duplex, repugnans, pregnans, and abundante of ſuch Adjectives; the Serjeant tells us, Judgment was given for the Plaintiff *niſi*, as it was entered in the Court-Books; but that he was informed by the Attorneys on both Sides, that the Court gave Judgment for the Defendant, and that their Attorney had received the Coſts taxed by the Prothonotary.

But admitting Judgment was given by the Court, yet it doth not appear what their Opinion was in this Caſe; becauſe the Defendant having demurred, if his Counſel do not argue the Demurrer, then the Plaintiff muſt have Judgment of courſe; and it appeared by the Prothonotary's Book, that the Demurrer was never argued.

The Serjeant farther tells us, That the Plaintiff's Attorney told him, that the Special Cauſes of Demurrer were only to amuſe him; but the true Cauſe was, becauſe thoſe Words (apud Rippon præd') were omitted in the Replication.

Certainly this Matter was not very well conſidered, for I cannot believe the Chief Prothonotary to be ſo much miſtaken (to ſay no worſe) as to enter a Rule for Judgment for the Plaintiff, when the Court pronounced it for the Defendant; and afterwards to tax Coſts for him againſt his own Entry.

I rather believe that the Attorneys miſ-informed the Serjeant, by telling him, That the Court gave Judgment for the Defendant, eſpecially ſince in the ſame Paragraph he tells us, That where a Defendant demurs, and his Counſel doth not argue the Demurrer, Judgment muſt be given againſt him of courſe; and he likewiſe tells us, That this Demurrer was never argued; if ſo, How could the Defendant have Judgment?

In the next Place, I think 'tis not very much for the Credit of the Lawyers, to tell the World that ſeveral Matters were pleaded only to *amuſe* the Plaintiff; but if it was ſo, How came the Plaintiff's Attorney to know it? 'Tis probable the Defendant's Attorney might be better acquainted with the Truth of this Matter; and therefore I ſhould have given more Credit to his Report than to this.

Huſtler verſus *Raines*.

Cooke. Trin. 5 W. & M.

Yorkſh. ſſ. TRESPASS for breaking his Houſe and Cloſe, and carrying away Wood, Stones, Timber, &c. and alſo a Load of Poſts, which were fixed in the Ground.

The

The Defendant juſtified the Taking, for that the Place where, &c. was his Freehold.

The Plaintiff replied, That it was his Freehold, and that the Defendant de injuria ſua propria did break the Walls, &c. and ſo avers all the Treſpaſſes as laid in the Declaration, only omitted the Load of Poſts; and then traverſed, That the Houſe and Cloſe was the Freehold of the Defendant; and upon Demurrer the Defendant had Judgment.

1. Becauſe the Plaintiff ought to conclude his Replication to the Countrey, and not with a Traverſe; for there is no new Aſſignment in it, that is, there was no new Place mentioned where the Treſpaſs was committed, other than that which was aſſigned in the Plea; ſo that the ſame Place being agreed on all Sides, the Traverſe of the Freehold muſt be ill; for the Plaintiff ought to have concluded, that it was his Freehold, and not the Freehold of the Defendant; & hoc petit quod inquiratur per patriam.

Some Caſes were cited to prove this, which the Serjeant tells us, were only named for Brevity ſake; but I believe they were cut ſhort, becauſe they do not prove that the Place where alledged in the Bar, is agreed to be the very Place in which the Treſpaſs was done; that the Bar is not fictitious, but real, and that in ſuch Caſe, a Replication with a Traverſe muſt be ill.

Cro. Eliz. 492. *Poph.* 109. This is ſo plain that it needs no Proof, but the Caſes cited are thus:

ff. In Treſpaſs the Defendants pleaded a Bar at large, in order to make the Plaintiff aſſign a certain Place; which he did afterwards aſſign in his Replication, but different from that in the Bar.

The Defendant rejoined and *averred*, That the Place ſet forth in his Bar, and the Place newly aſſigned by the Plaintiff in his Replication, were *one and the ſame*; and upon Demurrer the Plaintiff had Judgment, for the Defendant ought not to make ſuch an Averment; becauſe by the new Aſſignment, the Plaintiff had waived the Place ſet forth in the Bar, and alledged, That the Treſpaſs was done in another Place; therefore the Defendant ſhould have either rejoined in Bar, or pleaded not guilty to the new Aſſignment; for if in Truth both the Places ſhould happen to be the ſame, the Plaintiff cannot upon Evidence prove the Treſpaſs to be done in the Place where the Defendant juſtified the doing it; becauſe by his new Aſſignment, he had alledged it to be done in another Place.

And this is confirmed by the Opinion of Juſtice *Walmſley*, who tells us a new Aſſignment is a new Declaration, to which the Defendant muſt give a new Anſwer; becauſe all the former Pleading is waived by it; and therefore the Defendant cannot traverſe it, but muſt either plead or demur.

Cro. Eliz. 812. 'Tis true, where Treſpaſſes are alledged to be done in ſeveral Places, and the Defendant pleads to ſome, but agrees to the Places wherein the Plaintiff alledged the Treſpaſſes to be done; there the Plaintiff may anſwer that Part by a Traverſe, and ſhew a new Aſſignment to the reſt.

But the Caſe of * *King* and *Coke*, which was cited in the principal Caſe, is ſtill wider from the Matter: *ſſ.* It was in Treſpaſs; the Defendant juſtified for that the Place where, *&c.* was the Freehold of *John*, Marqueſs of *Winton*, *&c.* * *Cro. Car.* 384.

The Plaintiff replied, That *William*, Marqueſs of *Winton*, was ſeized in Fee, *&c.* and ſo derives a Title under him by a Leaſe, *&c.* And upon Demurrer it was objected, That the Replication did not anſwer, confeſs or avoid the Freehold of *John*; but the Court held it well enough, becauſe the Plaintiff claiming only under a Leaſe, that makes the Replication good, without anſwering the Freehold.

I cannot imagine why *Jones* 352 is cited, unleſs 'tis becauſe it was in the Margent in *Cro. Car.* for 'tis in no Sort applicable to the principal Caſe.

But the Serjeant tells us, That the Replication ſhould have been thus concluded, viz. That it was the Freehold of the Plaintiff, & hoc petit quod inquiratur per Patriam, and refers us to ſix Precedents in Raſtal, Title Treſpaſs in Frank-tenement 1, 2, 3, 7, 8, 10. **and in** Aſton's Ent. 504.

Theſe Precedents are truly cited, and ſo is the Year-Book 11 *H.* 4. 90 *a.* where the Caſe was thus: *ſſ.* In Treſpaſs the Defendant pleaded in Bar, That *tempore quo*, *&c.* it was the Freehold of one *W.* who made a Leaſe to him at Will, and ſo juſtified, *&c.* *Skrene*, the King's Serjeant, replied, That it was the Freehold of the Plaintiff; and Sir *William Hankford*, Chief Juſtice of the Common Pleas, objected againſt this Replication that it was too ſhort, for the Plaintiff ought to have added, that it was *not* the Freehold of *W.* and the Reaſon is plain, becauſe both the Plaintiff and the ſaid *W.* might be Joint-tenants, and ſo the Freehold in both; beſides, 'tis not a perfect Iſſue without a Negative.

There was another Exception to the Replication, viz. That the Plaintiff did not aver all the Treſpaſſes as laid in the Declaration, but omitted the Treſpaſs for carrying away the Load of Poſts; and this we are told was an incurable Fault, becauſe he had not maintained all his Declaration.

This ſeems to be a Nicety; for tho' he had not averred all the Treſpaſſes in that particular Manner as laid in the Declaration, yet one would think it had been ſufficient, when he alledged in his Replication, That the Defendant took and carried away *Bona & Catalla præd' modo & forma prout* the Plaintiff had complained againſt him; for *Bona præd'* muſt refer to *all* the Goods mentioned in the Declaration.

Huſtler verſus *Raines*.

Winford. Paſ. 7 W. III. Rot. 398.

Yorkſhire, ſſ. THIS was an Action of Treſpaſs between the ſame Parties, brought by the Plaintiff for breaking his Cloſe, called Huſtler's Farm-Houſe, &c.

The Defendant pleads in Bar, That the Plaintiff had obtained a Judgment againſt him in the Action laſt mentioned; and in this Plea all the Proceedings in that Action are ſet forth; then he avers, That the Places where the ſuppoſed Treſpaſſes were committed, &c. were the ſame, and that both Actions were brought for the ſame Treſpaſs; and upon Demurrer it was objected, that this Plea was not good.

1. Becauſe there was a ſpecial Cauſe of Demurrer in the firſt Action, viz. That the Plaintiff had not made a new Aſſignment in his Replication; ſo that he had agreed the Treſpaſs was done in the ſame Houſe and Cloſe mentioned in that Bar, which was Raines's Dwelling-houſe and Raines's Cloſe; but the Declaration in this Action was for a Treſpaſs in Huſtler's Farm-houſe, which is impoſſible to be the ſame, and therefore cannot be averred to be ſo.

2. There was a Diſcontinuance in the firſt Action, becauſe the Plaintiff, in his Inducement to the Traverſe in his Replication, had omitted the Cart-Load of Poſts, for which he had declared.

Now both theſe Matters being mere Slips, and not at all relating to the * Merits of the Cauſe; therefore a Judgment obtained upon ſuch Slips ſhall not be a Bar to a ſubſequent Action for a Treſpaſs actually committed.

* Vent. 314. 2 Lev. 210. *and not* 218.

As for Inſtance, two Joint-Executors brought an Action of Debt upon a Bond, *&c.*

5 *Rep.* 32. *B.* 2 *Cro.* 15. idem.

The Defendant pleaded, That one of them brought a former Action as Adminiſtrator againſt him upon the ſame Bond; to which Action he pleaded, That the Teſtator *Robinſon* made two Executors, *&c.* and traverſed that he died inteſtate.

The Plaintiff in that Action replied, That Adminiſtration was committed to him, *pendente lite* between the Executors; and upon Demurrer to that Replication, the Defendant had Judgment.

Thoſe Executors afterwards proved the Will, and one of them died; and the Survivor, who brought the former Action as Adminiſtrator, now ſued as Executor; and the Defendant in that Action pleaded the former Judgment in Bar; but it was adjudged to be no Bar, becauſe that Judgment was not obtained upon the *Right*, but merely by miſtaking the Action; ſo that tho' 'tis true that a Bar in a perſonal Action is a perpetual Bar, yet that muſt be underſtood where it goes to the Right of the Action, and not where the former Judgment was obtained upon a Miſtake.

6 *Rep.* 7. *B.* *Cro. Eliz.* 667. Preface to 8 *Rep.*

But

But *Piggott's* Caſe, which was cited in this, is wide from the Matter: *ſſ.* An Adminiſtrator, *durante minore Ætate* of the Executor, brought an Action of Debt, *&c.* and averred that the Executor was within the Age of 21 Years: Now this Declaration was held ill; for tho' it be true that the Adminiſtration determines when the Executor is 17 Years old, yet that Averment may be true, and the Adminiſtration at an End, becauſe he might be under 21; and yet above 17 Years old. 5 *Rep.* 29. *Cro. Eliz.* 602.

* So where there was a bad Declaration and an ill Plea, and the Court gave Judgment upon the Inſufficiency of the Declaration, the Entry in ſuch Caſe ſhould be *quod defendens eat inde ſine die*; but inſtead thereof it was miſtaken, and the Entry was *quia placitum præd', &c. bonum & ſufficien' in lege exiſtit, &c. ideo conſideratum eſt per Cur', quod querens nil capiat per billam*; then the Plaintiff brought a new Action, and declared right; and the Defendant pleaded the Judgment in the former Action in Bar, and recited the Record *Verbatim* in his Plea; and it appearing that the Judgment was entered upon an ill Plea, when it ſhould have been for the Fault in the Declaration; this was a plain Miſtake, and therefore it was held no Bar. * *Lepp* verſus *Kedgwin.*

But Juſtice Powel denied that Caſe to be Law, for that there was none like it in all the Books.

Thoſe who argued on the other Side ſaid, That the Judgment in the firſt Action was a good Bar in this; and to prove it, they cited † Sir Humfry Ferrar's Caſe, which was alſo cited by thoſe who argued for the Plaintiff. † 6 Rep. 7. Cro. Eliz. 667.

ſſ. It was an Action of *Trover* brought againſt one *Arden* for taking an Ox; the Defendant pleaded, That the ſame Plaintiff brought a former Action of *Treſpaſs* againſt one *Wignal* for taking the ſame Ox, who juſtified in that Action in the Right of the now Defendant for an Heriot due to him; and upon Demurrer, *Wignal* had Judgment, which the Defendant pleaded in Bar to this Action of *Trover*; and upon Demurrer to this Plea it was adjudged for the Defendant, becauſe by the Demurrer to the firſt Plea, the Property of the Ox was admitted to be in him; and therefore the Plaintiff could not bring *Trover* for it.

'Tis true, this Caſe is cited on both Sides, but I think it concerns neither; for the Plaintiff is to prove that a Judgment obtained by the Defendant upon a Miſtake in the Action, and not upon the Merits of the Cauſe, is no Bar to a new Action of the like Nature for the ſame Thing; and the Defendant is to prove that it is.

Now the Judgment in *Ferrar's* Caſe was not obtained by the Defendant upon any Miſtake in the Action, but becauſe the Plaintiff could never bring an Action of Trover, where, by his own Confeſſion, the Property appeared to be in the Defendant; for this was acknowledged by his Demurrer to the firſt Plea; and I cannot imagine why this Caſe ſhould be cited on the Defendant's Side, to prove that the Judgment in the firſt Action is a Bar to the ſecond, when *Anderſon* and *Glanvile* expreſly affirm that 'tis not; for they were both of Opinion, that Trover and Treſpaſs were Actions of different Nature,

and

and that a Bar in a wrong and improper Action, ſhall not be ſo to a right Action brought for the ſame Thing; and that was the Reaſon of the Judgment in *Robinſon*'s Caſe before-mention'd, *viz.* That a Judgment obtained by him as Adminiſtrator, when he was not ſo, ſhall never affect him when he brought a right Action as Executor.

Then as to the Averment, it was argued, That it was not inconſiſtent to ſay, that the Cloſes in both the Declarations were the ſame, becauſe the Word Clauſum is Nomen collectivum, and may refer to the ſame Cloſes, tho' they are of different Appellations; as the Word * Piſcis relates to many Sorts of Fiſhes of different Names.

* 4 H. 11.

4 *Rep.* 43. 1 *Leon.* 318. *Moor* 268.

An Appeal of Mayhem and an Action of Aſſault are different Actions, and vary in many Circumſtances; yet becauſe Damages are only to be recovered in both, a Judgment in Aſſault is a good Bar to an Appeal of Mayhem, and the Battery and Wounding may be averred to be the ſame, which Averment may be traverſed; and for this you may ſee 2 *Vent.* 169. and not 1 *Vent.* for that is a Miſtake.

Cade verſus *Hillary* & al'.

Winford. Hill. 7 W. III. Rot. 1273 & 1274. C.B.

Yorkſhire, ff. TRESPASS for taking away 40 Shoes and 20 Pieces of tanned Leather,

† 1 Jac. cap. 22.

The Defendant pleads the Statute † 1 Jac. 1. which he recited to be made in Parliamento tent' 19° Martii, in the firſt Year of his Reign, by which it was enacted, amongſt other Things, viz. That Shoe-makers ſhall make Shoes of good and ſufficient Stuff, and ſew them well, &c. That the Head Officers of Corporate and Market-Towns may yearly appoint and ſwear two or more skilful Men to be Searchers, *&c.* of Leather, who ſhall have Power to ſeize and retain ſuch as is inſufficient until it ſhall be tried by Tryors, *&c.* as the Act directs; that the Defendant was appointed and ſworn by the Mayor of York to be a Searcher, &c. and that the Plaintiff expoſed Shoes to Sale; That the Defendant entered his Shop to ſearch and inſpect them, and upon Search, found ſixteen Shoes to be ill worked, and made of Leather not well tanned; which he ſeized and kept till they ſhould be tried according to the Statute, and gave Notice thereof to the Mayor, &c. quæ eſt eadem captio, &c.

And upon Demurrer to the Plea it was objected, That the Statute was miſpleaded, becauſe it was recited to be made in Parliamento tent' 19 Martii, &c. when in Truth it was made at a Prorogation of that Parliament; and therefore it ought to be pleaded not as an Act made at a Parliament, but ad Seſſionem Parliamenti tent', &c.

We

We are told that there are many Book-Caſes which prove this Matter, but the Serjeant mentions but one, which is 4 *Inſt.* 27.

Now for the better Underſtanding this Nicety, my Lord *Coke* tells us, that when a Parliament is called and ſits, and is diſſolved *without an Act paſſed*, or Judgment given, 'tis no *Seſſion of Parliament*, but a Convention; if this is true, then there can be no Seſſion of Parliament without an Act paſſed, and yet in the ſame Page he tells us, That a *Seſſion* hath a Continuance till the *Parliament is prorogued or diſſolved*; ſo that whether an Act is paſſed or not, it ſeems that a Prorogation or Diſſolution makes a Seſſion, for otherwiſe it would be very improper to affirm, that a *Seſſion may continue till the Parliament is prorogued*; for it hath often happened that a *Parliament* hath been prorogued and diſſolved without an Act made.

My Lord *Coke* further tells us, That every Seſſion of Parliament is in Law a *ſeveral Parliament*, and therefore the uſual Pleading is, *ad Seſſionem tent' per Prorogationem, &c.*

I am apt to think that this nice Diſtinction between *Parliamentum*, and *Seſſionem Parliamenti*, was of his own Invention; it was not found out in *Anno* * 1° *Mariæ*; for in an Action then brought upon the Statute of Uſury, the Writ concluded *contra formam Statuti in Parliamento tent', &c.* and not *ad Seſſionem tent' per Prorogationem*, *Anno* 6 *Ed.* yet in that Action the Statute was recited to be made 23 *Januarii*, *Anno* 5. which was the firſt Day of that Seſſion; but it was continued by Prorogations from 1 *Ed.* 6. to 16 *April.* 6 *Ed.* 6. which the Court held to be one entire Parliament, begun and continued as aforeſaid. * *Dyer* 95.

So likewiſe in *Eaſter* Term, *Anno* 6 *Jac.* an Action of Debt was brought upon the Statute of *Ed.* 6. for not ſetting out Tithes, in which the Plaintiff declared *quod cum* 4° *Novembris* 2° *Ed.* 6. it was enacted, *&c.* After a Verdict for him it was objected that the Statute was miſrecited, becauſe the Parliament began *Anno* 1° *Ed.* 6. and continued by Prorogation to the 4th of *November*, and ſo ought to be pleaded; but the Court would not allow the Objection, but ſaid there were 100 Precedents to the contrary. *Yelv.* 127.

So that upon the whole Matter, this Diſtinction ſeems to be invented only to amuſe and puzzle the Reader, and to create a Difficulty in the plain and common Signification of the Word.

2. Then it was objected that the Statute recites, That Shoes ſhould be ſewed with well twiſted Thread; and this the Defendant hath expreſſed by very improper Words, viz. Filo bene applicato, inſtead of Filo bene torto.

3. The Statute is, That no Perſon who ſhall occupy the Myſtery of a Shoemaker, &c. and 'tis not averred that the Plaintiff was a Shoemaker at the Time of the Seizure, &c.

4. The Plea is, That upon Search the Defendant found that the Shoes were inſufficiently made, againſt the Form of the Statute, which is not a poſitive Averment in Fact that they were ill made; and for theſe Exceptions the Plaintiff had Judgment.

Walker verſus *Freeby* and *Holmes*.

Tempeſt. Hill. 7 W. III. Rot. 342.

Rutland, ſſ. IN Treſpaſs, &c. The Defendant juſtified by Proceſs out of an inferiour Court, ſetting forth, That at a Court of William Collins, nuper vic. &c. a Plaint was levied againſt the now Plaintiff for a Cauſe ariſing within the Juriſdiction, &c. but did not ſay where, and that Taliter proceſſum fuit, &c. that the Plaintiff in that Action got Judgment; and thereupon the Sheriff made a Warrant to the Defendants, (but did not ſay where it was made) to levy the ſame de Terris & Catallis, &c.

Upon Demurrer to this Plea, the firſt Objection was,

ſſ. 1. That the Plaint was alledged to be levied ad Curiam Will' Collins Ar' nuper vic. when it ſhould be adtunc vic.

2 Jones 185. 2. That the Defendant ought to have ſet out the Proceedings at large, and not with a Taliter proceſſum fuit, &c. becauſe 'tis no Court of Record; and every Thing done in ſuch a Court is traverſable.

2 Mod. 102, 105. But this Objection hath been over-ruled, for Taliter proceſſum fuit is the ſafeſt Way of Pleading.

3. 'Tis ſaid that the Plaint was levied for a Cauſe of Action ariſing within the Juriſdiction of the Court, but names no certain Place.

4. Nor any Place where the Sheriff made his Warrant, and that is iſſuable.

But to this laſt Objection it was anſwered, That it muſt be intended in the Court where the Judgment was obtained, becauſe 'tis ſaid, ſuper quo quidem judicio poſtea ſcilicet eiſdem die & Anno, the Sheriff per quoddam Warrantum ſuum, &c.

1 *Rol. Rep.* 135. And as a Parallel Caſe, my Lord *Rolle*'s Report was cited, where the ſame Objection was made; but I do not find that it was allowed; for my Lord *Coke* ſaid in that Caſe, That the Defendant had ſet forth a *Place* where the Warrant *was delivered*; from which we are to infer, that it was *made* where it was *delivered*: Now, if that will not be allowed to be a right Inference, then there could be no Occaſion for this laſt Objection in the principal Caſe, becauſe 'tis there ſet forth, That the Warrant was *delivered at Preſton* to the Defendants to execute.

5. That the Levari facias ought to be directed to the known Bailiffs, &c. And it doth not appear that the Defendants were ſo, but that they were only ſpecially named for this particular Purpoſe.

'Tis true, the Form of the *Levari facias* is ſo in *Dalton* 419. *ff. Præceptum eſt Ballivo, &c.* But I ſee no Reaſon why it may not be directed to others; and the Serjeant hath not been ſo kind as to inſtruct us in the Reaſon why it ſhould be directed to the known Bailiff, and not to any ſpecially named.

6. That

6. That the taking the Goods by Vertue of this Precept is only in Nature of a Diſtreſs, for they cannot be ſold, unleſs there is a Cuſtom for it; and if ſo, the Defendant ought to ſet it forth.

And for this Purpoſe my Lord * *Brook* is cited; but it was only the Opinion of *Thorp*, Chief Juſtice of *England obiter*, *Anno* † 22 *Ed.* 3. for my Lord *Brook*, in abridging that Year-Book, ſeems to be of a contrary Opinion, *viz.* That the Goods may be *ſold* upon a *Levari facias.*

* *Bro. Abr. Tit. Execution. pl.* 80.
† 22 *Aſſiz. pl.* 72.

And this is a very reaſonable Opinion, becauſe 'tis purſuant to the Form of the Precept, by which the Bailiff is commanded that *Levari faciat* the Money *de Bonis & Catallis* of the Defendant, and that *habeat Denarios illos* at the next Court, *reddendum* to the Plaintiff; which he cannot have, unleſs he hath Authority to ſell the Goods.

I muſt admit that the Form of the Precept in *Keilway* is otherwiſe, but that was in a Caſe *incerti Temporis*; and the Report is not much to be relied on, eſpecially ſince the Uſage is contrary. *Keil.* 106.

7. This Precept is to levy the Money de Terris & Catallis, when it ſhould be de Bonis & Catallis.

The Plaintiff had Judgment; but we are not told upon which Exceptions.

Catlin verſus *Milner* & Ux'.

Winford. Trin. 7 W. III. Rot. 1213.

Yorkſhire, ſſ. TRESPASS againſt Husband and Wife, for a Treſpaſs done by the Wife alone.

The Defendants plead Not guilty as to Part, and as to the reſt, they plead in Bar, That the Husband was ſeized of the Premiſſes in the Right of his Wife; and being ſo ſeized, he demiſed it to the Plaintiff for a Year, rendring Rent; which being in Arrear, the Wife entered and diſtrained, &c.

The Plaintiff replied, That after the Diſtreſs taken, the Wife uſed ſome of the Goods diſtrained, and ſold the reſt.

The Defendants rejoin and ſay, That immediately after the Diſtreſs, the Wife gave Notice thereof at the Dwelling-houſe, &c. and the Goods not being replevied, within five Days afterwards, they, with the Conſtable of the Place, cauſed the Goods to be appraiſed by three Perſons ſworn by him, which was done accordingly, and then ſold; and they traverſe that the Wife uſed them within five Days after the Diſtreſs: And upon Demurrer theſe Exceptions were taken to the Bar.

1. That the Husband alone ought not to have pleaded that he was ſeized in his Demeſne as of Fee in Right of his Wife, but that they were both ſeized in her Right; and ſo are all the Precedents,

2. The

2. The Iſſue is ill taken, becauſe the Charge in the Declaration is againſt the Wife alone, and yet they both plead Not guilty as to part; and this would have been a good Exception in Arreſt of Judgment, even after a Verdict.

Cro. Eliz. 883. 2 *Cro.* 5. As if Trover is brought againſt *Husband and Wife*, and the Converſion is charged againſt the *Wife alone*; if they *both* plead Not guilty, and the Plaintiff hath Judgment, it is not good, becauſe the *Husband* not being charged with any Wrong, the Iſſue ought to have been, *quod ipſa* is Not guilty; and thereupon the Judgment was reverſed, and that Reverſal was affirmed in a Writ of Error, *&c.*

There were ſome Objections likewiſe to the Rejoinder, ſ. That it was a Departure from the Bar, becauſe the Defendants had made a Juſtification at Common Law, viz. by a Diſtreſs, and the Plaintiff having avoided it in his Replication, by ſaying, That after the Diſtreſs the Wife had uſed the Goods, &c. The Defendants ought not in their Rejoinder to reſort to the new Statute of Diſtreſſes, &c. but ſhould have pleaded that at firſt.

21 H. 7. 25. B. As for Inſtance, Where the Son brought an Action of Debt for Rent upon a Leaſe made by his Father, and ſet forth, that the Reverſion deſcended upon him.

The Defendant pleaded, That the Father with others were ſeized, &c. to the Uſe of the Father, who made the Leaſe, and traverſed that the Reverſion deſcended to the Son; this was held a good Plea, and that the Plaintiff could never help himſelf by any Replication, becauſe having a good Cauſe of Action, he ſhould have ſet it forth at firſt; and ſo is my Lord * Coke's Comment on Littleton, viz. When the Defendant in his firſt Plea inſiſteth upon an Eſtate at Common Law, he ſhall never in his Rejoinder make it good by an Act of Parliament, which is this very Caſe.

* Fol. 334.

1 *Lev.* 81. *Sid.* 142. So where an Action of Covenant was brought upon an Indenture of Apprenticeſhip: The Defendant pleaded Infancy; the Plaintiff replied, That by the Cuſtom of *London*, Infants, after 14 Years old might bind themſelves Apprentices, *&c.* And upon Demurrer, the better Opinion was, that this was a Departure, becauſe the Plaintiff brought his Action at Common Law, and by his Replication would have maintained it by a Cuſtom.

4. It was alledged that the Goods were appraiſed by three Perſons ſworn by the Conſtable, when by the Statute he had only Authority to ſwear two Appraiſers; then if the ſwearing a third Perſon is void, the Perſon ſo ſworn ought not to intermeddle; and this the Defendants ought to ſhew in their Plea.

The Serjeant tell us, his Brother *Levinz* was of Counſel with the Defendants, but ſaid little to the Matter, only he anſwered the firſt Exception to the Rejoinder, *viz.* That by the Declaration the *Wife alone* was charged with taking and carrying away the Goods, and that in their Plea *both* juſtified the Taking, *&c.* Then when the Plaintiff had ſuggeſted new Matter in his Replication, on purpoſe to avoid that which was pleaded in the Bar, 'tis but reaſonable that the Defendants

fendants ſhould ſhew that what they did, was lawfully done by Vertue of the Statute.

'Tis true, if the Plaintiff had declared not only for the *taking*, but alſo for *uſing* and ſelling the Goods after they were taken; then the whole Matter had been before the Defendants, and they might have made an entire Juſtification, but that was not done. 36 *H.* 6. 37. *B.*

This ſeems to be a plauſible Anſwer, but the Court took no Notice of it, or of the other Exceptions to the Rejoinder, but gave Judgment for the Plaintiff, upon the Exceptions taken to the Plea in Bar.

Anonymus.

THE next is a Plea of Preſcription for a *Way*, which was pleaded in Bar to an Action brought for ſeveral Treſpaſſes; but *non conſtat* in what Court or in what Year, or between what Parties; ſo that 'tis without Name, Term or Number-Roll.

Stanhope verſus *Dawſon* & al'.

Winford. Trin. 7 W. III. Rot. 1736.

Yorkſhire, ſſ. TRESPASS for an Aſſault and Battery, and for breaking his Houſe, and the Doors and Windows thereof, and entering, &c.

The Defendant Dawſon, as to all, except the Aſſault, Battery and breaking the Houſe, pleads Not guilty, and as to the reſt he juſtified by Vertue of a Writ de homine replegiando, and a Warrant thereon directed to the Defendant Pearſon, who was a Sheriff's Bailiff, &c. to take one Walter Laycock out of the Cuſtody of Edward Stanhope, niſi captus fuit per mandatum Regis, &c. and that Laycock being eſſoined to the Houſe of Stanhope, the ſaid Defendant Pearſon, and the other Defendant Dawſon, in order to aſſiſt him, and by his Command entered the Houſe, the Doors being open, &c. whereupon the Plaintiff aſſaulted the ſaid Dawſon; and he to defend himſelf molliter manus impoſuit, &c.

The Plaintiff replied de injuria ſua propria, and traverſed that Dawſon entered the Houſe by the Command of Pearſon.

The Defendant rejoined, that he did enter the Houſe by the Command, and to aſſiſt Pearſon to replevy Laycock, ſecundum exigentiam warranti; and upon Demurrer it was objected to the Plea:

1. **That the Defendant being charged with breaking the Houſe in a particular manner, viz. the Doors and Windows, which is called a ſpecial breaking; therefore the Juſtification of breaking only, is not an Anſwer to the actual breaking the Doors and Windows, with which he was charged.**

To which it was anſwered, That the Defendant having pleaded Not guilty to all, except the Aſſault and breaking, that Plea muſt comprehend the actual breaking.

2. **The Writ was conditional, viz. to replevy Laycock niſi captus fuit per mandatum regis, &c. and therefore the Defendant ought to aver, That he was not taken by the Command of the King, or for any other Cauſe mentioned in the Writ.**

But the Anſwer was, That it ſhall not be preſumed that Laycock was guilty of any Offence; and therefore that he was not taken for any of the Cauſes mentioned in the Writ; but if he had, it ought to be ſhewed on the other Side.

The Serjeant doubts, Whether this was a ſufficient Anſwer to this ſecond Objection, but doth not ſhew any manner of Reaſon why he doubts it; but only affirms, that the Defendant could not juſtifie by a Writ *de homine replegiando* to enter a Houſe, becauſe upon all his Search, he could not find any ſuch Juſtification, which may be true, and yet the Juſtification may be good; for ſome Men do not ſearch with that Diligence which is requiſite, or if they do, 'tis probable ſuch a Juſtification may not be found; for 'tis an unuſual Writ, and not often brought; but it doth not follow that ſuch a Juſtification is not good becauſe it cannot be found, for it ſtands upon the ſame Reaſon with any other Juſtification, by Vertue of the King's Writ, and therefore it muſt be good, though the Serjeant cannot find it.

3. **The Writ was to take** Laycock **from** Stanhope: **Now a Bailiff cannot enter the Houſe of another Man by Vertue of ſuch a Writ, if the Perſon who was to be replevied, was not actually in the Houſe at the Time of the Entry, which is not averred by this Plea.**

The Anſwer was, That the Defendant ought not to make ſuch Averment, becauſe he had expreſly alledged, That Laycock **was eſloined to the Houſe, and that the Doors were open, ſo that he might lawfully enter to ſearch.**

The Plaintiff had Judgment, but the Serjeant cannot tell upon which of theſe Exceptions, only that it is his Opinion it was upon the laſt, becauſe there are two Authorities which come near it.

Cro. Eliz. 759. As for Inſtance, where in Treſpaſs for breaking and entering his Houſe, the Defendant juſtified the Entry, by Vertue of a Warrant upon a *Sci. fa.* to levy a Debt *de bonis Teſtatoris*, which Goods were in the Hands of the Executrix *tempore mortis Teſtatoris*; and averred that ſhe was in the Houſe *cum bonis ſuis*, and the Doors being open, he entered to levy the Debt; and upon Demurrer this Plea was held to be ill, becauſe the Defendant did not alledge that the Goods of the Teſtator were in the Houſe, for that had made his Entry juſtifiable.

So where in Treſpaſs the Defendant pleaded, that the Plaintiff owed him 100 *l.* and that the Doors being open, he entered to demand the Debt, *&c.* this was held an ill Plea, becauſe the Defendant did not aver that the Debtor was in the Houſe; for if that had been done, *Gawdy* was of Opinion that the Plea had been good.

I muſt obſerve, that theſe Caſes were mentioned to confirm this Judgment, for they were not cited in the Argument on either Side.

But now the Serjeant who was of Counſel for the Defendant, not only anſwered the Exceptions on the other Side, but made ſome Objections on both Sides.

1. ſ. That the Defendant had made a Diſcontinuance; for he pleaded Not guilty as to all the Treſpaſs, except the Aſſault, Battery and breaking the Houſe; and then ſays, quoad reſiduum tranſgreſſionis & inſult. &c. by which laſt Word he did exclude the Battery and Entering the Houſe, and applied his Juſtification to the Treſpaſs and Aſſault, when it ſhould have been quoad reſiduum tranſgreſſionis præd' (leaving out the Word inſult') and that had taken in all the Treſpaſſes to which he had not pleaded.

2. But if the Defendant had not made a Diſcontinuance in his Plea, the Plaintiff had done it in his Replication, for he had declared for an Aſſault, Battery and breaking his Houſe; and in his Replication he ſays, That the Defendant de injuria ſua propria beat him, and traverſed that he entered his Houſe by the Command of the other Defendant; when in the Inducement to that Traverſe, he ought to have alledged that the Defendant aſſaulted and beat him, and likewiſe, That he entered his Houſe, abſque hoc, &c.

But if this ſhould be no Diſcontinuance, 'tis a very abſurd Inducement, and he might as well have told a Story of Robin Hood in Barnhood ſtood, *Abſque hoc, &c.*

This puts me in Mind of the very ſame Expreſſion made by Sir *George Jefferies* formerly, and offered as a Reaſon why he would not demur to a Challenge.

The Story is thus: ſ. The Citizens of *London* being in *Guildhall* to chooſe Sheriffs, and the Majority of Votes being likely to fall upon Mr. *Papillion* and Mr. *Dubois*; the Lord Mayor Sir *John Moor*, adjourned the Poll, but notwithſtanding that Adjournment, the Citizens continued to poll, and choſe thoſe Sheriffs: Upon the Day of Adjournment, ſome other Citizens choſe Mr. *North* and another: Then an Information was brought for a Riot, againſt ſeveral of thoſe Men who continued to poll after the Adjournment; and Mr. *North* returned the Jury to try it, the Defendants Counſel challenged the Array, becauſe the Jury was returned by thoſe who were not Sheriffs *de jure*, which depended purely upon this Queſtion, *viz.* Whether the Lord Mayor had Authority to adjourn the Poll or not? All which Matter was ſet forth in the Challenge, and prayed that it might be allowed: This Serjeant *Jefferies* called a Tale of a Tub, but Mr. *Thompſon*, who then ſtood upon another Bottom, inſiſted, that if it was inſufficient in Point of Law, the Serjeant might demur

mur to it; who anſwered, that *Robin Hood upon Greendale* (and not *upon Barnbood*) *ſtood, ergo* I will not demur.

Now is not this very ſerious and ſubſtantial Reaſoning in a great Court of Juſtice, by thoſe who are called Sages of the Law?

Searle verſus *Darford.*

Paſ. 8 W. III. Rot. 579. C B.

Huntingdon, ff. TRESPASS for an Aſſault at Hamerton, &c. The Defendant pleaded, that he was poſſeſſed of a Cloſe, &c. in Conington, and that the Plaintiff entered, and refuſing to depart, the Defendant molliter manus impoſuit, and ſo juſtified in Defence of his Poſſeſſion, and traverſed that he was guilty at Hamerton or out of the ſaid Cloſe.

The Plaintiff replied, That he entered in a Way which was uſed there by Sufferance, and that he did not go out of it, but that the Defendant being in a Paſſion de injuria ſua propria aſſaulted him at Conington, and traverſed that he molliter manus impoſuit.

And upon Demurrer the Queſtion was, Whether this Replication was a Departure from the Declaration? And reſolved it was not; becauſe in a tranſitory Action as this is, the Plaintiff may not only alledge the Injury to be done in another Vill, but in another County than where it was actually committed; and the Place thus alledged cannot be traverſed, unleſs the Defendant ſheweth ſome Special Cauſe of Juſtification, which extends to a particular Place.

As in the Caſe of a Conſtable arreſting a Man for the Breach of the Peace, if an Action is brought againſt him, and laid in another County than where the Arreſt was, he may traverſe that County and all other Places, but only that particular Place where he is Conſtable.

So likewiſe in Treſpaſs for taking the Plaintiff's Goods, if 'tis laid in one County, the Defendant may juſtifie in another County for Damage Feaſant, and traverſe what is laid in the Declaration.

But when the Juſtification is not local, nor reſtrained to a particular Place; in ſuch Caſe if the Action is laid in a Foreign County, the Defendant may juſtifie in that very County: As if an Action is brought in Surrey, for a Battery in Middleſex, the Defendant cannot plead ſon aſſault demeſne in Middleſex, and traverſe the other County, but muſt juſtifie in Surrey, where the Action was laid; and the Reaſon is, becauſe the very Cauſe of the Juſtification being not limited to any certain Place, it muſt therefore be good in any Place.

So in an Action on the Caſe for Words ſpoken at London, the Defendant pleaded a Concord for ſpeaking the Words in all other Counties except London, and traverſed that they were ſpoken there; the Plaintiff replied and traverſed the Concord; and upon Demurrer to this Replication he had Judgment, becauſe if the Concord ſhould not be denied, the Conſequence would be, that this new invented Way of Pleading, would deſtroy an antient Rule in the Law, which is, That the Plaintiff in a tranſitory Action may alledge the Fact to be done in what County he will, and therefore in that Caſe he might alledge, That the Words were ſpoken in London, though really they were ſpoke elſewhere; but by that Plea he is lock'd up to prove the Words ſpoken in London; ſo that rather than to ſubvert that Rule, the Judges allowed a Traverſe upon a Traverſe. Moor 428.

The Serjeant is very right in this Matter, for he hath tranſcribed all the Page *verbatim*, out of my Lord *Coke*'s *Comment* on *Litt.* and becauſe he would make it ſomething longer, he hath faithfully tranſcribed the Caſe of *Paramour* and *Verrold* out of *Popham*, which is no more than thus: *Litt.* 282. *B.* *Poph.* 101. *Moor* 350.

ſſ. An Action was brought for a Falſe Impriſonment, alledged to be done *in Warda de Faringdon London.*

The Defendant juſtified in *Kent, &c.* by Vertue of a *Capias ad ſatisfaciend'* upon a Judgment in Debt, obtained in the Court of *Sandwich*, and traverſed that he was guilty in *London, &c.* The Plaintiff replied, That the Defendant was guilty at *London*, and traverſed this Recovery in *Sandwich, &c.*

From which Caſe I obſerve, that though 'tis regularly true, that a Traverſe upon a Traverſe is not to be allowed in Pleading; yet if the Special Caſe of Juſtification alledged by the Defendant, ſhould be falſe, and the Plaintiff ſhould be admitted to traverſe it, but ſhould be forced to take Iſſue upon the Defendant's Traverſe; then he muſt prove that he was falſly impriſoned in *London*, and muſt be Nonſuited if he cannot prove it.

So that by this Means, Actions, which in their own Nature are tranſitory, would be made local; that is, Plaintiffs in ſuch Actions muſt not lay them in any Place, becauſe by their Pleading, the Place would be made material, which is againſt Law; and therefore a Traverſe upon a Traverſe is allowed to be good. *Cro. Eliz.* 407. 10 *Ed.* 4. 3 *a.*

Clarke verſus *Lockey* & al'.

Winford. Trin. 8 W. III. Rot. 370 & 371.

Yorkſhire, ſſ. TRESPASS for Breaking and Entering his Cloſe, and taking and detaining his Cattle, until he paid 10 l. 17 s.

The Defendant juſtified by Vertue of ſeveral Levari facias's, upon Judgments obtained in the Hundred Court, and ſets forth all the Proceedings at large, and that the Precepts were delivered to him to execute; who by Vertue thereof as Bailiff of the Hundred, entered the Plaintiff's Cloſe, to take and ſell his Cattle, and thereby to levy 10 l. 10 s. 9. for Damages and Coſts; that accordingly he did take and drive away the Cattle, and detained them for want of Buyers, until the Plaintiff paid the Money; that is to ſay, 10 l. 10 s. 9 d. for Damages and Coſts recovered, and 6 s. 3 d. for the neceſſary keeping the Cattle, from the Time they were taken to the Time the Money was paid; and traverſed that he was guilty ante emanationes ſeparal' præceptorum; and upon Demurrer it was objected againſt this Plea,

1. That the detaining the Cattle till he was paid for the keeping them, made him a Treſpaſſer ab initio, for he had not any ſuch Authority by the Precepts; for thoſe were to levy the Money and no more.

And to prove this, he tells us *Godfrey*'s Caſe was cited, which he admits to be nothing to the Purpoſe; and this has ſaved me the labour of looking farther into it.

But it was argued for the Defendant, That the Cattle were kept for the Benefit of the Plaintiff, becauſe the Bailiff might have ſold them at any Price; and therefore 'tis reaſonable to intend that he kept them in favour of the Plaintiff, till he could pay the Debt, or find thoſe who would give a valuable Conſideration for them; and it would be very hard to make the Defendant ſuffer for this Kindneſs.

Beſides, 'tis but Surpluſage for him to alledge, That he detained the Cattle until the Plaintiff paid the ten Pound ſeventeen Shillings; for he might have juſtified the Taking, without mentioning for what he detained them; becauſe the detaining quouſq; he paid the Money, is no Part of the Treſpaſs, 'tis only put in the Declaration to aggravate the Damages, and therefore the Defendant need not anſwer it, which the Court agreed to be true; but becauſe it was inſerted in the Plea, and was not any Part of the Execution, therefore it made the Plea ill; and yet they held it unreaſonable that the Bailiff ſhould keep the Cattle at his own Charge; and ſo this Cauſe was compromiſed.

Nevill verſus *Peckham* & al'.

Cooke. Trin. 8 W. III. Rot. 1606

TRESPASS for Breaking and Entering his Cloſe called Hurnett's-Hill, in the Pariſh of Rumboldſwick, and for Chaſing, Taking and Impounding his Sheep there.

The

The Defendants, as to all beſides the chaſing, taking and impounding, &c. plead Not guilty, and as to that they plead, That William Peckham was ſeized in Fee of a Cloſe called New Orchard in Rumboldſwick aforeſaid, and ſo juſtify the taking Damage-Feaſant in the New Orchard, and impounding them in aperto loco in Rumboldſwick, and traverſe that they chaſed, took and impounded them in Hurnett's-Hill; and upon Demurrer,

1. It was objected, That this Plea was ill, becauſe the Defendant traverſed the chaſing at Hurnett's-Hill, when no ſuch Thing is charged againſt him; for the Declaration was for Breaking his Cloſe called Hurnett's-Hill at Rumboldſwick, and for chaſing his Cattle there, which Word muſt relate ad proximum antecedens, and that is Rumboldſwick; ſo the Chaſing muſt be ſuppoſed there.

To which it was anſwered, That all the Treſpaſs was alledged to be done at Hurnett's-Hill, and the Addition of the Parish of Rumboldſwick, is only to ſhew where that Hill lieth.

Beſides, the Defendant having juſtified the taking, &c. Damage-Feaſant in another Cloſe, viz. in the New Orchard, 'tis neceſſary he ſhould traverſe the taking in Hurnett's-Hill; otherwiſe he would not anſwer the Treſpaſs in the Declaration.

For in Treſpaſſes the Defendant muſt always obſerve where the Plaintiff alledgeth it to be done. 22 *Ed.* 4.51.

As for Inſtance, if an Action of Treſpaſs is brought for cutting his Reeds in *Bromwicke*, the Defendant cannot plead, That the Place where the Treſpaſs was ſuppoſed to be done, was called *L.* which is in *D.* and not in *Bromwicke*, without traverſing that he was guilty there.

2. But admitting the Defendant might traverſe the taking at Hurnett's-Hill, yet being charged with the chaſing and pounding, either of thoſe Acts will make him a Treſpaſſer; and therefore the Traverſe ought to be abſque hoc, &c. that he chaſed, took and impounded the Sheep in the Cloſe called Hurnett's-Hill.

I cannot imagine what is meant by this Exception, for he who reads the Pleading, will find the Traverſe goes to both chaſing, taking and impounding in *Hurnett's-Hill.*

All the Treſpaſſes are alledged to be done there, and therefore 'tis impoſſible for the Defendant to make a good Juſtification by pleading any ſpecial Matter, tho' true, without traverſing the chaſing, taking and impounding there; for it would be impertinent to traverſe the chaſing, &c. at Rumboldſwick, becauſe upon his own ſhewing in his Plea, he hath ſet forth the Facts to be done in New Orchard in Rumboldſwick.

But if the Plaintiff had alledged the taking the Sheep to be at R. and the Defendant had juſtified for Damage Feaſant in another Vill, in ſuch Caſe he ought to traverſe the taking at R. but having juſtified in the ſame Vill, though in another Place, he could not in the ſame Plea traverſe the taking in that Vill, becauſe that would be to make his Plea contradictory in it ſelf, viz. in the firſt Place to juſtifie the taking at R. and then to deny that he took them there;

* *Cro. Eliz.* 667.

and this would be worſe than the Plea in Sir* Walter Sands's Caſe, who in Treſpaſs for taking his Cattle at *Stockbridge*, and chaſing them to Places unknown; pleaded, That the Lord *Sands* was ſeized in Fee of twelve Acres in *Motſerne*, and that the Defendant as his Servant, took the Cattle *there* Damage Feaſant, and chaſed them from thence to *Stockbridge*, there to impound them, *&c.* and traverſed the taking at *Stockbridge*; and upon Demurrer to this Plea it was held ill, becauſe it was repugnant; for the driving the Cattle to the Pound in *Stockbridge*, was the continuing the firſt *taking*.

There is a great deal more reported in this Caſe, but 'tis only the Serjeant's Opinion, and delivered in a very unintelligible Manner; to which I refer the Reader, not for his Information, but to ſee what little Niceties have been invented to make Things intricate, and almoſt ſenſeleſs.

Hargrave verſus *Ward* & al'.

Cooke. Hill. 9 W. III. Rot. 1735 & 1736.

Norwich, ff. TRESPASS againſt the Defendant and others, for breaking and entering his Houſe at Norwich, on the 10th of November, and taking and detaining nine Hundred and forty Pounds of fine Yarn, two hundred Pieces of Stuffs, and ſeveral other Goods to the Value of 506 l. &c.

The Defendants plead in Bar, That the Citizens of Norwich were incorporated, Anno 5 H. 4. and that before the Incorporation, there had been a Court of Record held there Time out of Mind, before the Bailiffs, and afterwards before the Sheriffs of the City, for the Trial of all perſonal Actions ariſing therein, or within the Liberties thereof; That the Plaintiff was indebted to the now Defendant Ward, in 27 l. 8 s. for Goods ſold and delivered; That a Plaint was levied againſt him for the ſaid Debt, and he not appearing upon a Summons, his Goods were attached by the Defendants, who were Serjeants at Mace, by Vertue of an Attachment directed to them; and by which they entered the Houſe, &c. on the 11th Day of November; that the Serjeant returned his Precept executed; that he had the Goods at the next Court, ready to anſwer the Plaintiff in that Action; and that the now Plaintiff Hargrave, appeared in the ſaid Court, and rendered himſelf in Cuſtody in diſcharge of his Goods, and ſo they were re-delivered to him; quæ eſt eadem fractio & intratio, &c. and then they traverſe, that they are guilty aliter vel alio modo.

The Plaintiff demurred ſpecially, and ſhewed for Cauſe, that there was no Manner of Occaſion for this Traverſe; and upon a Joinder in Demurrer it was reſolved,

ſſ. That the Treſpaſs in breaking and entring the Houſe is alledged to be on the 10th Day of November; and tho' the Juſtification is on the Day after, yet the Defendants averring that 'tis eadem fractio, that would have made the Plea good without a Traverſe.

So where a Treſpaſs was alledged to be done 7° *Maii*, and the Defendant juſtified on the 10th Day, *quæ eſt eadem Tranſgreſſio*; this was held a good Plea by three Judges againſt *Yelverton*. 1 *Bulſt.* 138. *Cro Car.* 228. 2 *Jones* 146.

All the other Caſes cited do agree, That a Treſpaſs alledged to be done on a particular Day, need not be anſwered as to the preciſe Day; but 'tis ſufficient if the Juſtification be on another Day, ſo as there is an Averment that 'tis *eadem Tranſgreſſio*; becauſe the Fact is to be anſwered, and not the Day on which it was done.

'Tis true, where the Treſpaſs and Juſtification vary in Time, and it doth not appear in the Plea to be *eadem Tranſgreſſio*; there the Defendant muſt traverſe that he was guilty at any other Time; but a Traverſe (as in this Caſe) that he was guilty *aliter vel alio modo*, doth not relate to the Time, but to the Manner of doing the Act; ſo that this Traverſe muſt be inſignificant, becauſe it doth not anſwer the Time alledged in the Declaration; and the Traverſe it ſelf was anſwered before by the Averment that it was *eadem fractio, &c.*

It muſt be admitted that this Traverſe is only Surpluſage; but upon Demurrer it being ſhewed for Cauſe, it makes the Plea naught, becauſe the whole Treſpaſs was anſwered before by thoſe Words, *viz. Quæ eſt eadem fractio, &c.* and therefore it ought not to be traverſed again.

There was a Caſe where a Man was indicted for uſing the Trade of a Woollendraper at *Framlingham* in *Suffolk*, not having ſerved an Apprenticeſhip to that Trade; he pleaded a Grant from *H.* 3. to the Mayor and Commonalty of *London* that they might buy and ſell their Goods any where, and that he being a Citizen and Freeman of *London*, did reſide at *Framlingham* to buy and ſell Cloth *pront ei bene licuit*, which is the *ſame uſing* the Trade of a Woollendraper as alledged in the Indictment, and traverſed that he uſed it *aliter vel alio modo.* 1 *Saund.* 312.

'Tis true, the Plea was held ill, becauſe the Grant of *H.* 3. could not be a Diſpenſation of the Statute 5 *Eliz.* it only intended to give Liberty to the Citizens of *London* to ſell their Goods in many Places where the Inhabitants claimed a Privilege to exclude Foreigners.

But *Saunders*, who was of Counſel for the King, tells us the Plea was ill, becauſe the Defendant had confeſſed the uſing the Trade of a Draper, tho' not as an Offence, for he had avoided that by the King's Grant, and therefore it was abſurd to traverſe the uſing it *aliter vel alio modo*; this was his Opinion.

There was another Fault in the Plea, *viz.* It did not appear that the Sheriffs of *Norwich*, before whom theſe Courts were held, had any Authority to keep them.

For theſe Cauſes the Plaintiff had Judgment; but the Serjeant hath added another Reaſon, *viz.* That it was not juſtifiable for the Defendant to attach ſuch a vaſt Number of Goods to compel an Appearance for a very ſmall Matter, and a little Diſtreſs had been ſufficient for that Purpoſe; which is very true.

Grey & Ux' verſus *Hart*.

Tempeſt. Hill. 9 W. III. Rot. 346.

Eſſex, ſſ. ASSAULT and Battery brought by Husband and Wife, for an Aſſault upon the Wife dum ſola.

The Defendant juſtified by Vertue of a Warrant upon a Capias ad reſpondendum.

The Plaintiff replied, De injuria ſua propria abſque tali Warranto, and concluded to the Country; and upon Demurrer it was objected, That the Defendant ſhould traverſe the Warrant, and then conclude to the Country, without ſaying de injuria ſua propria; but this Exception was not allowed.

Then it was objected that the Bar was ill, becauſe the Defendant did not ſhew out of what Court the Capias iſſued; and for this Cauſe we are told the Plaintiff had Judgment niſi cauſa.

Doubtleſs the Court gave ſome Reaſon for their Judgment, tho' the Serjeant doth not mention what it was, neither is there any Book cited; but it ſeems to me to be a Nicety, becauſe by the Writ the Sheriff is commanded *quod capiat* the Defendant, ſo that it may be well intended to be a Writ iſſuing out of the Common Pleas; beſides it appears to be the King's Writ; and ſo it ſeems not very material for the Defendant to alledge out of what Court it iſſued.

Selman verſus *Perry* & al'.

Tempeſt. Trin. 9 W. III. Rot. 1992.

Shropſhire, ſſ. TRESPASS for taking a Gelding at Clobury.

There was Judgment againſt Chetwyn, one of the Defendants, by nil dicit; and the other Defendant pleaded, That the Earl of Newport was ſeized in Fee of the Hundred of Stotteſden, and that King Car. 2. by Letters Patent granted to the ſaid Earl and his Heirs a Court of Record to be kept in the ſaid Hundred, in ſuch Places, and on ſuch Days as the ſaid Earl ſhould think

think fit, by his Steward or Deputy, &c. with a Power to make Serjeants at Mace to execute all Attachments and Proceſs iſſuing out of that Court.

Then he ſets forth, That a Plaint was levied there againſt the now Plaintiff, at a Court held in the ſaid Hundred before the Deputy Steward, virtute literarum patentium præd'; that a Precept was directed to the Serjeant at Mace, and to John Chetwyn, to attach the Goods of the Plaintiff; that the Precept was delivered to Chetwyn alone, who by Vertue thereof took the Gelding, &c. then he averred that it was eadem Tranſgreſſio; and upon Demurrer it was objected to this Plea,

ſſ. 1. That the Authority which the Earl had by this Grant was not purſued, for he was to hold Court, &c. by his Steward or Deputy, but it did not appear that the Earl did make a Steward; and if ſo, there could be no Deputy.

But it was anſwered, That the Court was held before a Deputy virtute literarum patentium, which is ſufficient.

2. The Court was to be kept on ſuch Days, and in ſuch Places as the Earl ſhould think fit; and 'tis not averred that he appointed either Time or Place; but the Anſwer to the former Exception was likewiſe an Anſwer to this.

3. By Vertue of this Grant, all Proceſs was to be directed to, and executed by the Serjeant at Mace; but here the Attachment was directed not only to him, but to Chetwyn and another, and executed by Chetwyn alone; and this was held not to be purſuant to the Power, and therefore the Plaintiff had Judgment.

The Serjeant has paraphraſed upon the Incoherence and Obſcurity of that Part of the Plea; where 'tis ſet forth, That the Attachment was directed to the Serjeant at Mace *ac miniſtro Curiæ*; which Words muſt relate only to the Serjeant at Mace; therefore the ſubſequent Words *necnon* to *John Chetwyn*, without ſaying *præd'*, by which it was commanded the Serjeant at Mace *ac miniſtro Curiæ, or one of them*, to attach, *&c.* Now *unus eorum* is not agreeable to the Words precedent, becauſe the Serjeant at Mace *ac miniſter Curiæ*, are not diſtinct, but the ſame Perſon.

But if the Attachment may be directed to the Serjeant at Mace and *others*, then I cannot ſee any Reaſon why the Words *unus eorum* may not relate to one of them.

Adams verſus *Hatcher*.

Trin. 9 W. III. Rot. 492.

Northton, ſſ. IN an Action of Aſſault, the Defendant pleaded his Privilege as a Servant to Shem Bridges, one of the ſix Clerks in Chancery; and upon Demurrer it was objected,

1. That

* 3 H. 6. 30. a. 11 H. 6. 8. B. Cro. Eliz. 256.

1. That he did not ſet forth what * ſort of Servant he was, or where he was retained,

And for this the Serjeant tells us ſeveral Caſes were cited, *viz. Penned* verſus *Chambers*; but there he muſt be miſtaken, for the Fault in that Caſe was, That the Plaintiff in his Replication had not averred what he pleaded.

So is *Sid.* 319. where 'tis laid down for a Rule, That every Plea of Privilege ought to be averred, and ſo is 2 *Sid.* 164. *Foſter* verſus *Barrington.*

2. 'Tis true, it was objected that the Defendant had not averred his Plea, and for that Reaſon the Plaintiff had Judgment, probably upon the Authorities above-mentioned; which were miſplaced by the Serjeant under another Objection, tho' it was anſwered that no Advantage could be taken of it upon a General Demurrer.

The other Objections were not material; for it was not neceſſary to ſet forth what Sort of Servant he was, becauſe it was a General Privilege for all his Servants; neither was there any Occaſion to allege where he was retained, becauſe the Fact was not to be tried by a Jury, but by a Certificate out of Chancery.

Ward verſus *Boſworth.*

Tempeſt. Mich. 9 W. III. Rot. 1901.

Rutland, ſſ. TRESPASS for beating his Horſes ſo that they were not fit for Service, and for breaking his Cloſe at Belton, &c.

The Defendant as to all beſides the breaking the Cloſe pleads Not guilty, and as to that he pleads in Bar, That the locus in quo, &c. is an Acre of Land called Blackacre in Belton, and that 'tis his Freehold.

The Plaintiff replies and makes a new Aſſignment of the Treſpaſs, viz. That it was done in a Cloſe called the Millfield in Belton aforeſaid, and not in the ſaid Acre called Blackacre.

The Defendant rejoins in Bar to the new Aſſignment, for that the Place called Millfield was a Common Field, and that at the Time of the Treſpaſs one George Jarman was ſeized in Fee of an ancient Houſe and ſix Acres of Land in Belton aforeſaid, and ſo preſcribes to have Common appurtenant in the Millfield for all commonable Cattel, levant and couchant on the ſix Acres, every Year that the ſaid Field was ſown with Corn, and after it was cut and carried away, and until it was ſown again; and if it had lain fallow, then for the whole Year.

That the ſaid Field was ſowed, &c. and that ante tempus of the ſuppoſed Treſpaſs the Corn was cut and carried away, and that dicto tempore of the ſaid Treſpaſs it was not ſowed; whereupon

the Defendant as Servant to the ſaid Jarman, and by his Command entered and put in his Cattel to uſe his Common, quæ eſt eadem Tranſgreſſio.

And upon Demurrer this Exception was taken to the Rejoinder, viz. That the Defendant had not brought his Caſe within the Preſcription, which was for Common of Paſture for commonable Cattel; but he did not ſhew that the Cattel which he put in were commonable.

The Serjeant tells us there was but one Argument, and not a Caſe cited, nor any Judgment given; and therefore to entertain the Reader he hath cited one himſelf, and puts a *Quære* to it, Whether 'tis not applicable to the principal Caſe? It was thus,

ſſ. In Replevin the Defendant avowed for Damage-feſant in his Freehold. 2 *Crd.* 637.

The Plaintiff replied and preſcribed to have Common in any Place in the Field, *after the Corn was cut* and carried away, and *until* it was ſowed again; and then ſets forth, That *ante tempus quo, &c.* the Field was ſowed, and after the Corn was cut and carried, he put in his Cattle; and upon Demurrer this Replication was held ill, becauſe the Plaintiff had not alledged in what Year the Corn was ſown.

Now there is no great Difference between the Preſcriptions; for one is for Right of Common *when the Field is ſown*, and after the Corn is cut, and the other is *after the Corn* is cut and carried, and until the Field is ſowed again: Now, tho the Corn cannot be cut until the Field is ſown, yet the Omiſſion of thoſe Words will occaſion different Allegations to bring each of theſe Caſes under the Preſcription.

As for inſtance, In the principal Caſe the Defendant hath poſitively alledged, That in the Year *quo* the Field was ſowed, and that before the Time *quo* the Corn was cut and carried, and *dicto tempore quo* the Field was not ſowed again, he put in his Cattel.

Now the Pronoun *quo* in all theſe Sentences muſt relate to the Time *in which the Treſpaſs was ſuppoſed to be done*, and not to the Time *in which the Field was ſowed*; becauſe the Time of the Treſpaſs was plainly alledged before.

But in the other Caſe it muſt relate to the Time in which the Field was ſowed; and it being too general and an incertain Allegation to ſay, *That before the Time quo* the Corn was ſown, and after it was cut, he put in his Cattel; therefore the Plea in that Caſe was held ill; for being confined by the Preſcription to a particular Time, in which he is ſtill to have Common, he ought to ſet forth that Time in a particular Manner, and ſhew that he is within it.

Talbot Mil. verſus *Woodhouſe* & al'.

Tempeſt. Hill. 10 & 11 W. III. Rot. 1282.

Worceſter, ſſ. TRESPASS for cutting and carrying away ſix Oaks.

The Defendant juſtified under a Leaſe made unto him by the Plaintiff, for Life, in which there was a Covenant that the Defendant ſhould repair, and that it ſhould be lawful for him to take fit and convenient Timber upon the Premiſſes, by the Appointment of the Bailiff, and not otherwiſe; then they alledge that the Houſe was out of repair, and that the Bailiff did appoint Jane and William Woodhouſe to cut fit and convenient Timber for the neceſſary Repairs of the Houſe, and no more; thereupon they cut the ſaid Oaks, &c. and imployed ſome in repairing, and would have uſed the reſt for that Purpoſe, if the Plaintiff had not forbid the Workmen, &c.

The Plaintiff replied de injuria ſua propria, and traverſed that the Bailiff of the Manor had appointed Jane and William Woodhouſe, two of the Defendants, to cut and carry away the ſaid Oaks for Repairs; and upon Demurrer it was objected,

ſſ. That the Traverſe was too ſtrict, becauſe, if the Defendant had took Iſſue upon it, he muſt have proved that thoſe very Trees were neceſſary for Repairs.

It ſhould have been, That the Bailiff had not appointed, or that the Trees were not neceſſary or convenient for that Purpoſe.

'Tis true, he appointed them to take what was fit and convenient, and they averred in their Plea that thoſe Trees were convenient for repairing; and this is confeſſed by the Demurrer; ſo that the Plaintiff hath no more Damage by that General Appointment, than if the Bailiff had appointed thoſe very Trees for that Purpoſe; and if it ſhould appear, that thoſe were more than neceſſary; yet the Defendants are in no Fault, but the Bailiff.

It appears by the Plea that he was the Perſon required by the Defendants to make an Appointment, and it was no more than he was obliged to do, and which he did accordingly: Now if the Appointment was void, then 'tis the ſame in effect as if he had made none at all; and in ſuch Caſe the * Leſſee might juſtify the taking the Timber by Law.

* 1 Inſt. 54.

Dyer 148. *B. pl.* 5. was cited to prove this; but there is nothing there to this Purpoſe, nor any ſuch *pl.* as 5.

It was argued on the other Side that the Bailiff had exceeded his Authority, for he ought not only to appoint, but to ſet out what was convenient; but here he had delegated this Power to the Tenant, and had made him the Judge of what was convenient, when ſuch an Authority is not transferrable in its Nature.

To

To prove this * *Pilkinton*'s Caſe was cited, in which two Points were reſolved; but neither of them to this Purpoſe.

* 5 *Rep.* 76. *Cro. Eliz.* 332.

ff. It was Replevin; and the firſt Reſolution was, That when a Diſtreſs is taken for Damage-feſant, the Party may tender Amends till the Cattel are pounded; but afterwards 'tis too late. 2. The Tender to the Bailiff is not good, but it ought to be to the Perſon injured; for when once the Bailiff hath diſtrained, he cannot deliver the Cattle.

One of the Judges obſerved that the Traverſe was ill, not for the Reaſon before-mentioned, but becauſe it was that the Bailiff had appointed Jane and William Woodhouſe to cut the Oaks, which was not alledged in the Plea; for that was, that he appointed them to cut fit and convenient Timber; and of that Opinion was the whole Court.

But then the ſame Judge objected likewiſe to the Plea in Bar, viz. That where Trees are excepted as they were in this Leaſe, and a ſpecial Authority is given to the Tenant to take them for Repairs; that Authority ought to be ſtrictly purſued, otherwiſe the Tenant will be a Treſpaſſer; but if there is no ſuch Exception in the Leaſe, then if the Bailiff will not appoint what is convenient, the Tenant may reſort to the General Liberty, which is given him by the Law; viz. To take what is neceſſary.

That in the principal Caſe the Bailiff had made the Tenant Judge of what was convenient, which is contrary to the expreſs Words of the Covenant; for that is, That he ſhall have convenient Timber by the Appointment of the Bailiff, and not otherwiſe.

Now 'tis plain that he had not executed his Authority, and the Defendants had none without him; for which Reaſon the Plea was held ill.

I have nothing to obſerve on this Caſe, but that there is a very long Leaſe recited *Verbatim* in the Pleadings, which doth not a little add to the Bulk of the Book, and which the Serjeant himſelf hath in the Margent confeſſed not to be material to the Point in Queſtion.

Shingleton verſus *Smith.*

Hill. 11 W. III. Rot. 1666.

Glouceſter, ff. IN an Action of Aſſault, the Defendant pleaded Son aſſault demeſne.

The plaintiff replied, That he was retained by Mr. Sandys, as his Servant to take Care of his Horſes, and that the Defendant would have beaten one of them; but the Plaintiff laid his Hands on the Defendant in Defence of the Horſe, and thereupon he aſſaulted him.

The

The Defendant reſoined, That he was Servant to Mr. Ridler, who was ſeized in Fee of a Cloſe called Davys Green, which was well fenced, and that the Defendant ſeeing one Payton, another of Mr. Sandys's Servants, attempting to leap over the Fence on Horſeback, he forbid him, but in vain; thereupon the Defendant endeavoured to hinder him; and the Plaintiff coming to aſſiſt Payton, aſſaulted the Defendant, who defended himſelf, and traverſed that he was guilty, &c. but in Davys Grove; and upon Demurrer it was objected to the Replication,

1ſt. That it was not ſufficient to alledge that the Defendant would have beaten the Horſe, but he ought poſitively to ſet forth, That he did beat him before he laid his Hands on the Defendant; and this is plain upon the common Plea of Son aſſault demeſne, in which 'tis always alledged, That the Plaintiff firſt aſſaulted the Defendant, before he alledges that he defended himſelf.

But there were ſeveral Precedents cited to ſhew that 'tis not always ſo; as where the Defendant pleaded, That the Plaintiff aſſaulted him, * *& ipſum verberaſſe voluit.*

* *Raſt. Ent.* 612. *pl.* 11.

† *Idem pl.* 15.

And in another Place 'tis ſaid † *ad ipſum verberand. inſultum fecit*; which are not poſitive Allegations that he did beat him.

The ſame Book is cited, *fol.* 668. *pl.* 4. but there is nothing there relating to this Matter.

But notwithſtanding theſe Precedents the Court was of a contrary Opinion, and gave Judgment for the Defendant.

It was obſerved by one of the Judges, That there is a great Difference between a Juſtification in Defence of the Perſon, and of the Goods or Poſſeſſion.

As for inſtance, A Servant may juſtify a Battery in Defence of his Maſter, but not in Defence of his Goods.

But yet in *Owen* 94. 'tis ſaid, That my Lord Chief Baron *Tanfield* relied much on a Book; (but 'tis not mentioned what Book) but we are told that he had ſeen the Roll, *viz.* 15 *H.* 7. *Rot.* 35. where a Man juſtified a Battery in Defence of his Dog; and in the ſame Book 150. my Lord *Coke* tells us, That a Man may uſe Force, that is, he may juſtify an Aſſault and Battery too in Defence of his Goods, but cannot juſtify any wounding or maiming.

Rowley verſus *Haſſard* & al'.

Tempeſt. Trin. 11 W. III. Rot. 360.

City of Coventry, ſs. TRESPASS for breaking his Cloſe and Houſe, and taking and carrying away ſeveral Goods.

The Defendants juſtified by Vertue of an Habere facias Poſſeſſionem upon a Judgment in Ejectment; then they ſet forth the Writ, and that it was delivered to them, being Sheriffs, &c. who entered,

entered, &c. & bona in executione brevis præd' extra domum amoverunt, &c. and upon Demurrer this was held not to be a ſufficient Anſwer to the carrying away the Goods, for they ought to ſhew to what Place they were carried, and where they had left them.

Dutton verſus *Tayler.*

Hill. 12 W. III. Rot. 1598.

ſſ. TRESPASS for breaking his Cloſe called Horſeleaſow, and for breaking, ſpoiling and carrying away twenty Perches of Hedge.

The Defendant pleads an Unity of Poſſeſſion in one Ralph Cleaton, in the Cloſes called Horſeleaſow and Hollingburſt, which were contiguous to an antient Lane called Blackall-Lane, and that he had no Way or Paſſage to Hollinghurſt, but through Horſeleaſow.

That the ſaid Cleaton ſold Horſeleaſow to one Aſtbury, but at the Time of ſuch Sale, he had no other Way to Hollinghurſt; that thereupon the ſaid Ralph Cleaton ought of neceſſity to have a Way to Hollinghurſt, through the Land which he ſold to Aſtbury; and ſo juſtified the Breaking the Hedge for a Way, &c. and upon Demurrer it was objected;

1. That the Juſtification for Breaking the Hedge was not a ſufficient Anſwer to the ſpoiling it.

This ſeems to be a very nice Objection, for when a Hedge is broken down, 'tis certainly ſpoiled as to its being a Hedge.

2. Admitting there was once a Way, 'tis now loſt by Unity of Poſſeſſion, and it not being reſerved particularly by the Vendor, at the Time when he ſold the Cloſe, it ſhall never be reſerved by Implication of Law.

And for an Authority in Point, this * Caſe was cited. ſſ. A Man had a Cloſe, and a Wood adjoining to it; and Time out of Mind there had been a Way over the Cloſe to the Wood: Now it was held, That if the Cloſe ſhould be ſold to one, and the Wood to another, the Perſon who bought the Wood, ſhall not have a Way over the Cloſe, unleſs 'tis particularly reſerved in the Purchaſe-Deed. * *Cro. Eliz.* 300.

If a Man hath Land to which a Way doth belong by Preſcription, and another piece of Land through which that Way doth lie, 'tis extinguiſhed by Unity of Poſſeſſion; this was the Opinion of three Judges againſt two, becauſe a Man cannot preſcribe for a Way in his own Land. 1 *Rol. Abr.* 935. *pl.* 8.

But yet this muſt be a Miſtake, for the ſame Caſe is reported by
*Owen 121. Juſtice * *Owen*, who tells us, That there were three againſt two of a contrary Opinion; and they took this Difference, *viz.* That if the Way was for Eaſe and Pleaſure, then it was extinguiſhed by Unity; but if it was of Neceſſity, then it was not; for if it ſhould, a Man might loſe the Benefit of his Land; and this Diſtinction was allowed in the principal Caſe, and ſo it was in *Parker* and *Welſted*'s Caſe. 2 *Sid.* 39.

3. **It was objected, That the Defendant had not ſhewed by what Conveyance the other Cloſe was ſold.**

This was certainly a very weak Objection, for it was almoſt impoſſible for the Defendant, to ſet forth a Conveyance to which he was a meer Stranger; and if he had ſet it forth, it would have made the Plea, and by Conſequence this Book, ſomewhat longer, but neither of them the better.

Pell verſus *Garlick*.

Cooke. Hill. 12 W. III. Rot. 1195.

Northampton, ſſ. TRESPASS for taking quatuor pullos, and for Breaking his Cloſe called the Lay of Ground, &c. at Moulton.

* This had been good in a Declaration, but not in a Plea, becauſe an Iſſue cannot be taken upon it. 1 Rol. Rep. 394.

The Defendant pleads in Bar, That he was * poſſeſſed of a Piece of Ground called the Market-Baulke in Moulton; and ſo juſtifies the taking, &c. Damage Feſant; and as to the Reſidue of the Treſpaſs, he ſets forth, That there were ſeveral Cloſes at Moulton, called Lay of Ground, but none without ſome other addition; and that the locus in quo, &c. was called Garlick's Lay of Ground, and ſo juſtifies in his Freehold; and upon Demurrer it was objected,

ſſ. 1. That this being a Plea in Bar, the firſt Part of it was not good, becauſe the Defendant had ſet forth, That poſſeſſionatus fuit of the Cloſe, without ſhewing the Commencement of his Eſtate; and we are told, that the Court was of that Opinion.

Cro. Car. 138. 2 *Mod.* 70. 3 *Mod.* 132. 4 *Mod.* 419. This is contrary to ſeveral Books, where 'tis held, That ſuch a Plea is good in an *Action of Treſpaſs*, though it might be otherwiſe in Replevin; for in the firſt Caſe the *Poſſeſſion* is a good Title againſt all other Perſons whatſoever.

'Tis true, where a Title may come in Queſtion, ſuch Pleading had not been good; but the Matter of this Plea is collateral to the Title; therefore where the Intereſt of the Land cannot come in Queſtion, a Man may juſtifie upon his Poſſeſſion againſt a Wrong-doer.

2. **It was objected, That the Plea was double as to the Treſpaſs in the Lay of Ground, by alledging that there was a Cloſe of that**

Name; and then juſtifying in a Cloſe called Garlick's Lay of Ground.

But it was anſwered, That the former Part was only introductory to the ſubſtance of the Plea, and to reduce the Place to a more particular Certainty.

As in Detinue the Defendant pleaded, That after the Delivery of the Goods, the Plaintiff *married* the Lord *Audley*; and that during the Coverture, he gave a *Releaſe* of all Actions: Now though two Things were ſet forth in this Plea, *viz.* a Property in the Husband by the Inter-marriage, and his Releaſe; yet that did not make the Plea double, becauſe it was impoſſible for the Defendant to plead the Releaſe of the Husband, without pleading the Marriage. *Moor* 25.

So where the Dmandant in a *Formedon in deſcender*, counted upon a Gift in Tail made to his Father, and that he died, and that the Lands deſcended to his elder Brother, who died without Iſſue; and ſo conveyed a Title to himſelf as Heir in Tail: The Tenant pleaded, that the elder Brother had *Iſſue* a Daughter, who levied a *Fine* to him; now both theſe Things were good and diſtinct Anſwers to the Plaintiff's Title, *viz.* That his elder Brother had a Daughter, ſo that he could not be Heir in Tail to him; and that ſhe levied a Fine, which was likewiſe a good Bar to him; but yet for all this, the Plea was not double, becauſe the Tenant could not plead that the Daughter had levied a Fine, without ſhewing that the elder Brother had ſuch a Daughter. *Goldſ.* 88. *pl.* 13.

The Year Book 5 *H.* 7. 38. is cited, which I have peruſed, but find nothing there to this Purpoſe.

3. **It was objected, That the laſt Part of the Plea amounted to the general Iſſue.**

To which it was anſwered, That the Name given in the Declaration, to the Cloſe, was not ſo certain but that it might be reduced to a greater Certainty, and ſuch as was conſiſtent with that very Name; and as this Caſe is, there ſeems to be a Neceſſity to fix a more certain Name to it; for otherwiſe 'tis impoſſible for the Defendant to know to which Cloſe to plead; and for this Purpoſe the Year-Book of Ed. 4. was cited.

Iſſ. It was an Action of Treſpaſs done in two Acres generally. The Defendant ſet forth, That thoſe Acres were called *White's Acres*, and then pleads in Bar, *&c.* 21 *Ed.* 4. 80, 81.

Townſend, one of the Judges, was of Opinion, That the Plea was ill, becauſe the Defendant ought not to vary from what the Plaintiff had declared, by giving thoſe Acres a new Name, which the Plaintiff had not done, and ſaid, That this was not like an Action of Treſpaſs for Breaking a Cloſe, without giving it a Name; for in ſuch Caſe the Defendant might ſhew by what Name it was called.

But the Chief Juſtice *Brian*, and *Catesby*, were of another Opinion, *viz.* That the Plea was good; and they grounded their Judgment upon this Diſtinction, *viz.* That where the Plaintiff ſets forth a Name in his Declaration, there the Defendant ſhall not vary from it, and give it another Name; but where he declares for a Treſpaſs done

done in an Acre of Land generally, without giving it a Name, there 'tis otherwiſe; for ſuppoſe the Plaintiff hath three Acres called by diſtinct Names, and the Defendant had committed Treſpaſſes in all of them, but had a Releaſe as to the Treſpaſſes done in two of thoſe Acres, and then the Plaintiff brings an Action for a Treſpaſs done in one Acre generally, without giving it a Name; now if the Defendant ſhould not diſtinguiſh the Acres in his Plea, by ſetting forth their particular Names, it muſt certainly go againſt him, becauſe otherwiſe it could not appear to which of the Treſpaſſes the Releaſe was given.

One of the Judges held that the Plea was good, notwithſtanding theſe Exceptions; the reſt did not ſpeak to it, but all agreed, That the Plea being ill for Part, was ſo for the whole; and ſo the Plaintiff had Judgment, and a Writ of Enquiry was executed, and Damages given; and then the Defendant moved in Arreſt of Judgment, That the Declaration was ill, becauſe it was for taking quatuor pullos **without an** Anglice, **when the Word** pullus **ſignifies the Young of any Thing.**

But properly the Young of Fowl, and if 'tis put to ſignifie any other young Thing, then there muſt be an Adjective of the Species, as *pullus equinus.*

And if there had been an *Anglice* to it, that would not have made it better, becauſe it never helps where the *Latin* hath not a colourable ſignification of the *Engliſh* Word.

This Exception was not allowed, becauſe the Defendant had juſtified the taking, &c. ſo that it appears he did know what he took.

Smith & al' verſus *Milward* & al'.

Trin. 11 W. III.

ſſ. THERE are ſeveral joint Merchants, one of them dies, and his Executor, and the ſurviving Partners, bring an Action of Treſpaſs againſt the Defendant, for taking their Goods in the Life of the Teſtator; this is all the Caſe, for there is no Plea or Demurrer.

Keck verſus *Halſtead.*

Trin. 11 W. III.

Midd. ſſ. TRESPASS for killing his Maſtiff.

The Defendant pleads, That it was a fierce Dog, and did often bite Men and Cattle, of which the Defendant had Notice; That the Dog came into the Defendant's Yard againſt his Will; ſo that he was afraid to go out of his Houſe, of which the Plaintiff had Notice; and the Defendant deſired him to keep his Dog out of the Yard, which he refuſing or neglecting, the Defendant ſhot the Dog in his own Yard, and traverſed that he was guilty extra atrium ſuum.

The Plaintiff replied de injuria ſua propria, upon which they were at Iſſue, and a Verdict for the Defendant; and by the Opinion of the whole Court the Plea was held good.

The Serjeant doth not ſhew that there was any Objection made to the Plea, why it ſhould not be good, neither doth he give any Reaſon for the Judgment, and ſo there was no Occaſion of citing any Book.

Randle verſus *Dean* & *Pope.*

Hill. 13 W. III. C. B.

ſſ. TRESPASS for beating his Horſes and Servants, &c. per quod ſervitium amiſit.

The Defendant pleaded in Bar, That the Mayor and Aldermen of B. were poſſeſſed of an Acre of Land called the Key; and that the Plaintiff's Horſes being loaded with Soap-Aſhes, his Servants voluiſſent & conabantur to unload them on the ſaid Key, without the Mayor's Leave, whereupon the Defendants as his Servants, and by his Command, molliter manus impoſuerunt on the Plaintiff to hinder him, and did gently ſtrike the Horſes, without doing them any Hurt; and traverſed that they were guilty aliter vel alio modo, vel extra the ſaid Acre.

To this Plea the Plaintiff demurred, and it was objected that it was double, and that the Traverſe was repugnant to the Matter precedent.

I do not find that the Plaintiff's Counſel inſiſted on thoſe Objections, but on theſe which follow.

ſſ. 1. That the Defendants had juſtified as Servants to a Corporation, without ſhewing any Authority under the Common Seal.

This Objection was not allowed, and I believe 'tis rightly diſtinguiſhed in the Book, *viz.* That where a Corporation hath a Head, as a Mayor is in this Caſe, there he may command Perſonally, without giving any Power under the Common Seal; but where 'tis aggregate without any Head 'tis otherwiſe, and as to this Point three Caſes were cited.

Sid. 441. First, Where in an Action of Treſpaſs the Defendant juſtified under Letters Patents to particular Perſons, for the ſole Trading to the *Canaries*, but did not ſhew any Warrant or Authority from them; it was only ſaid, *per mandatum eorum* he ſeized the Goods; and for this Reaſon the Plea was held ill.

The other Caſes are in 16 *H.* 7. 2. B. and 1 *Lev.* 107. but there is nothing in either of thoſe Books relating to this Matter.

2. It was objected, That it doth not appear that the Plaintiff's Servants were either upon or near the Key; for 'tis quod voluiſſent & conabantur to unload the Goods and put them there; and this was held a good Exception, and to prove it theſe Caſes were cited;

1 *Rol. Rep.* 393. *ſſ.* In Treſpaſs the Defendant pleaded, That he was *poſſeſſed* of an Houſe which had an antient Light, and that the Plaintiff's Servants *intendebant & conabantur* to ſtop it by building another Houſe, by ſetting up Timber which the Defendant pulled down, *&c.* this was held ill, becauſe the Intention to build an Houſe was not triable.

Cro. Eliz. 248. So where in Treſpaſs the Defendant juſtified, That the Plaintiff *capere voluit* his Conies with Nets, and thereupon *molliter manus impoſuit* on him.

3. The Defendant had not anſwered the Plaintiff's Allegation, viz. per quod ſervitium amiſit: Now the Maſter could have no ſuch Action, unleſs he had loſt the Service of his Servants, and therefore molliter manus impoſuit is not a proper Plea, for he ſhould have pleaded Not guilty.

The Serjeant hath added a *Nota*, that the Reader might know it was obſerved by him, That there was no Exception taken to the Plea, for alledging that the Mayor poſſeſſionatus fuit, which was held ill in Pell and Garlick's Caſe before, that being, as this is, a Plea in Bar.

Kerby verſus *Wichelow.*

Cooke. Hill. 12 W. III. Rot. 1703.

Berks, ſſ. TRESPASS for taking three Buſhels of Barley, &c. on the 16th Day of November, at Wallingford.

The Defendant pleaded as to all except ten Pints, Not guilty, and as to that, he juſtifies for Toll in Wallingford Market, of all

Foreigners bringing Corn thither; that at the Time of the Treſpaſs, John Ferrars a Foreigner, brought five Quarters of Barley to Wallingford, to be ſold there, and that he ſold it to the Plaintiff Kerby, but did not ſay ibidem, &c.

The Plaintiff replied de injuria ſua propria, and traverſed that the five Quarters of Barley, or any Part thereof, was ſold in the Market; and upon Demurrer it was objected,

1. That there is no Place alledged where the Barley was ſold: 'Tis true, he ſets forth that it was brought to Wallingford, but doth not ſay that it was ſold there.

It was anſwered, That this was a meer Nicety, for the Treſpaſs is alledged to be done on the 16th of November, and the Defendant juſtified the Taking on that very Day, for Toll of Barley ſold; and ſhews that it was brought on that Day to Wallingford, to be ſold, ſo that it muſt neceſſarily be intended, that it was ſold on that Day, and at that Place; for otherwiſe the Plaintiff can have no Property in the Barley, to maintain an Action of Treſpaſs for taking it on that Day; and a Man muſt put a Force upon the Words, to imagine that the Corn was brought thither on ſuch a Day, and afterwards ſold to the Plaintiff on the ſame Day, but at another Place.

Some Caſes were cited, to prove that ſuch Intendments have been allowed where the Thing itſelf is not plainly expreſſed: As for Inſtance,

In Treſpaſs in *Motsfont*, the Defendant pleaded, That he was ſeized of the Rectory of *Motsfont*, in the Right of his Church, and of a Meſſuage called the Parſonage; and ſo juſtified for a Way, *&c.* It was objected, That it was not ſet forth *in what Vill* the Houſe was; but it was not allowed, becauſe it ſhall be *intended* that the Parſon is always reſident upon his Parſonage. *Cro. Eliz.* 898.

So where Debt was brought upon a Retainer in ſuch a Place, to embroider a Gown, it was objected, That the Plaintiff did not alledge *where* he embroidered it; but it was held, That it ſhall be *intended* where the Retainer was. *Cro. Eliz.* 880.

So in Reſcous the Plaintiff declared, that he took the Cattle at *C.* for Toll, but that the Defendant reſcued them, without ſhewing *where*, *&c.* it ſhall be intended where they were taken. *Theloall Lib.* 10. *c.* 9. *pl.* 6.

All that is ſaid in *Yelverton* is, That what is done in a Day, ſhall be intended to be done at the ſame Time, becauſe there ſhall be no Fraction of a Day.

Bowkley

Bowkley verſus *Williams* & al'.

Shropſh. ff. TRESPASS for Breaking and Entering his Houſe, and taking away a Gun.

The Defendant juſtified by Vertue of the * Statute made for preſerving the Game; and ſet forth, That the Lords of Manors and other Royalties, may depute Game-Keepers, who by Vertue of ſuch Deputation, may ſeize Guns, &c. within the Precincts of their Manors; that ſuch Game-Keepers, or any other Perſon, by a Warrant from a Juſtice of Peace, may ſearch the Houſes, &c. of ſuſpected Perſons to keep Guns, and ſeize them for the Uſe of the Lord of the Manor; that Sir John Weld was ſeized in Fee of the Hundred of Burton, and of a Court-Leet, &c. and that the Defendant had a Warrant from a Juſtice of Peace of the Will and Liberty of Wenlock, to ſearch in the Manors of Marſh and Willey, and Precincts of the Court-Leet and Hundred aforeſaid, which were within the Liberty of Wenlock; that Sir John Weld was Lord of the ſaid Manor, and that the Plaintiff was not qualified to keep a Gun; and being ſuſpected thereof, the Defendant entered his Houſe, which was within the ſaid Hundred, and within the Precincts of the Court-Leet and Liberty of Wenlock, where he found the Gun, and ſeized it.

* 22 & 23 Car. 2. c. 25.

There was no Occaſion of ſetting forth all this Matter in the Plea, becauſe the Defendant acting under a Warrant from a Juſtice of Peace, might have pleaded the General Iſſue, but if he had acted as a Game-keeper only, and without a Warrant, he muſt have pleaded Specially.

But Serjeant Jenner ſigned this Plea, which makes me think it was drawn by him to this length; and as to the Matter of it, 'tis a Queſtion, Whether a Hundred or Court-Leet are comprehended under the Word Royalties? for if not, then the Defendant ſhould not have averred that the Plaintiff's Houſe ſtood within the Hundred, but within the Manor, &c. becauſe the Gun was ſeized for the Uſe of the Lord of the Manor; and if it was within his Manor, then 'tis impertinent to mention either the Hundred or Precincts of the Court-Leet.

Poynton verſus *Wilſon.*

Tempeſt. Hill. 12 W. III.

Derbyſh. ſſ. TRESPASS for breaking his Cloſe called the Orchard, in Whaley, &c.

The Defendant pleaded, That he is a Pariſhioner of Bolſover, and ſo preſcribes for a Foot-Way from Bolſover, in, by and through the Plaintiff's Cloſe called the Orchard, to Whaley, and ſo back again.

The Plaintiff traverſed the Preſcription, and thereupon they were at Iſſue, and the Defendant had a Verdict.

And now the Plaintiff moved in Arreſt of Judgment, that it was impoſſible there could be ſuch a Preſcription, viz. from Bolſover, through the Cloſe called the Orchard, to Whaley, becauſe according to the Plaintiff's own ſhewing, the Orchard was in Whaley; and ſo it was impoſſible for him to go from thence to Whaley, for when he is at the Orchard, he is in Whaley.

But it was anſwered, That Whaley ſhall be intended the Hill it ſelf, where the Houſes are, and where the People dwell; and the Orchard may be at the fartheſt Extent of the Pariſh. Thom. Entr. 326, 327.

Daile verſus *Coates.*

Winford. Hill. 12 W. III. Rot. 1155.

Yorkſhire ſſ. THE Writ was quare vi & armis he broke the Plaintiff's Cloſe, & bona ſua he took and carried away.

The Declaration was for breaking the Houſe, and for taking bona & catalla omitting ſua, and alſo the Words vi & armis; there was Judgment by Default, and it was moved, that by Reaſon of the Omiſſion of thoſe Words, the Declaration was ill.

And as to this Objection, we are directed to look into ſeveral Caſes which are cited in the Margent, and where Declarations have been adjudged ill for this very Fault, even after a Verdict, and many more might have been cited to the ſame Purpoſe, but this is not Law now; becauſe by the expreſs Words of the Statute 16 & 17 *Car.* 2. this Defect is cured by a Verdict, and by the Statute 4 & 5 *Annæ*, 'tis enacted, That no Exception ſhall be taken, of or for the Omiſſion of thoſe Words. 2 *Cro.* 412, 526, 443. *Hob.* 180. *Cro. Car.* 405.

'Tis true, theſe Words were formerly held to be eſſential, becauſe the Queen was intitled to a Fine for all manner of Force, ſhe being the chief Guardian of the Peace, but now 'tis otherwiſe.

2. It was objected, That the Plaintiff did not alledge that he had any Property in the Goods, but only that the Defendant took bona & catalla, but did not ſay ſua.

As to that Objection it was anſwered, That in the Common Pleas the Writ is Part of the Declaration, to which it properly refers, and ſua being in the Writ, though not in the Declaration, 'tis that which makes the Declaration good.

Sid. 150. As for Inſtance, In Treſpaſs for taking his Goods *ad valenciam, &c.* thoſe Words were omitted in the Declaration, but being in the Writ it was held good after a Verdict; but Juſtice *Twiſden* in that Caſe ſaid, There might be a Difference between a Suit by Original and by Bill.

Sid. 187. So in Treſpaſs, the Writ was for taking *bona & catalla ſua*, and the Declaration was for taking an Ox, but did not ſay *ſuum*, the Plaintiff had a Verdict, which was affirmed in Error, upon the very Diſtinction in the principal Caſe.

Clarke and his Wife *verſus* the Lady *Scroggs*, Executrix of Sir *William Scroggs*.

Cooke. Hill. 12 W. III.

Berks, ſſ. I cannot imagine how this Caſe came to be thruſt under this Title; for it was an Action of Covenant upon a Leaſe for Years, &c. in which there was a Covenant to pay the Rent, and another to repair, and the Breaches were aſſigned on thoſe Covenants.

The Defendant pleaded an Outlawry of the Plaintiff, in Bar to the whole Declaration, and this ſub pede ſigilli of the ſame Court in which the Action was brought.

And upon Demurrer it was objected, That ſuch Outlawry ought not to be pleaded to the whole, becauſe the Damages which were to be recovered for not Repairing, being very incertain, are not for that Reaſon forfeited by the Outlawry.

3 Leon. 205. But it was anſwered, That an Outlawry hath been pleaded in Bar to an Action of Trover, and to an Action on the Caſe, for a quantum meruit for Meat and Drink, and held good, and yet in both thoſe Caſes, the Plaintiff can only recover Damages, which are as incertain as thoſe which are to be recovered for not Repairing.

* 2 Vent. 282.

Beſides, the Rent was certain, and that is forfeited by the Outlawry, and therefore it may be pleaded in Bar to that which is certain.

But notwithſtanding theſe Caſes, this Plea was held to be ill, becauſe it was intire, and to the whole Declaration; and it was bad without Queſtion as to the Repairs, for the Reaſon before-mentioned, and therefore being bad in Part, 'tis bad in the Whole.

The Defendant, before Imparlance, might have pleaded the Outlawry in Abatement to the Writ, or he might have pleaded it in Bar to the Rent, and in Abatement to the Repairs; but not in Bar to them, becauſe the Damages in ſuch Caſe are no more forfeitable than Damages for a Battery or a Treſpaſs, before they are recovered.

An Outlawry may be a good Plea to an Action of Trover, becauſe that is an Action which is founded upon the Property of the Goods, and thoſe are forfeited by an Outlawry, though Damages not recovered are not.

So likewiſe an aſſumpſit upon a quantum meruit is a Duty which is the Ground of that Action; for the Conſideration creates a Debt, though the Recompence is to be had by way of Damages.

There are ſome *Nota's* made by the Serjeant on this Caſe, to ſhew that he hath obſerved ſomething in the Pleading, which was not mentioned either at the Bar or Bench; and that was, That the Defendant *venit & defendit vim & injuriam quando, &c.*

What he means by this I cannot tell; certainly 'tis not that the Plea was informal, and that a full Defence ought not to be made in a Plea in Bar; the Precedents are as this is, and ſo is the Pleading in *Moor* and *Webb*'s Caſe, which he hath cited. 2 *Vent.*

By his ſecond *Nota* he obſerves, That there is no Occaſion of pleading the Outlawry ſub pede ſigilli, becauſe it was in Bar to the Action, and pleaded in the ſame Court where that was brought.

Then he ſhews us what is the formal Concluſion of a Replication, viz. If the Plaintiff had replied Nul tiel Record, he muſt conclude & hoc parat eſt verificare qualitercunq; &c. prout Cur' conſid' Et quia juſtitiar' hic ſe adviſare volunt ſuper inſpectionem recordi per præd' (the Defendant) ſuperius allegat' dies dat' eſt partibus præd' hic uſq; &c. and for this Matter my Lord Dyer is cited, where there is a Precedent of ſuch an Entry, and that it ought not to be thus, viz. dictum eſt præfat' (the Defendant) quod habeat recordum hic (on ſuch a Day) &c. ſub periculo, as it was in that Caſe, becauſe ſuch an Entry is informal, when the Record is vouched in the ſame Court in which the Action is brought. Dyer 227, B. 228.

But there are ſome Precedents where 'tis & hoc paratus eſt verificare per recordum illud, and then the Entry is quod petit quod recordum illud videatur. Raſt. Ent. 104. Herne 278.

Morgan

Morgan verſus *Evans.*

Paſ. 12 W. III. C. B.

ſſ. TRESPASS for breaking his Cloſe, &c.

The Defendant pleaded that D. P. was ſeized in Fee of a Water-mill and of a Wear, and ſo preſcribed to come on the Plaintiff's Cloſe to repair the Wear, &c.

The Plaintiff replied and confeſſed the Seiſin, &c. and the Cuſtom to repair, &c. but ſaid that the aforeſaid D. P. had extended the Wear beyond the ancient and uſual Place; and upon this they were at Iſſue; but it doth not appear what became of the Caſe.

Bennington verſus *Taylor.*

Paſ. *or* Trin. 12 W. III. C. B.

IN Treſpaſs the Defendant pleaded in Bar, That, Time out of Mind, there was a Meadow called F. adjoining to the Manor of Peterborough, and that the Dean and Chapter of Peterborough were ſeized of the ſaid Manor, and ſo preſcribes in them, as Owners of the Manor, to have a Fair every Year on St. Matthew's Day; to be held partly in the ſaid Meadow and Manor, &c. and to have and receive reaſonable Toll, viz. Amongſt other Things, one Shilling for a large double covered Stall in the Fair, & pro fundo & ſolo prope & juxta the ſaid Stall, uſed therewith, and to be paid upon Demand at any Time during the Fair, &c.

Iſſue was joined upon this Preſcription, and the Defendant had a Verdict; and it was moved in Arreſt of Judgment;

Moor' 474. 1. That Toll could not be due for Stallage, becauſe 'tis a Duty payable only for live Cattel; and therefore the Duty which ariſes by Stallage is not properly Toll.

And to prove it, the Year-Book 9 *H.* 6. 45. was cited.

Br. Abr. Tit. *Toll.* 2. My Lord *Brook* in abridging that Caſe tells us, That by Cuſtom Toll may be paid for every Thing brought to a Fair, and that the Party muſt pay for his *Standing* beſides, tho' he ſell nothing; which ſhews that Toll and the Duty of Stallage are different Things.

And if ſo, the Law requires that apt and proper Words ſhould be uſed in pleading, and therefore where in Treſpaſs the Defendant preſcribed for a * Paſſage to a Field; this was held ill, becauſe Paſſagium is an improper Word for a Way; for it ſignifies a Paſſage over the Water, and not a Way over the Land.

* Yel. 163.

So

So where the Plaintiff declared that there had been anciently quoddam Tolnetum Anglice a Ferry within the Vill of Littleport; this was held ill for the Repugnancy.

This laſt was the Caſe of *Pain* and *Partrick*; the Serjeant tells us that the Plaintiff had a Verdict, but it was adjudged in *B. R.* upon a Demurrer, and upon a Point in Law, and not upon an improper Word in the Pleadings; and it ſeems very ſtrange to me, that he who drew that Delaration could find no other Word than *Tolnetum* for a Ferry, when every Dictionary will furniſh him with a ſignificant Word for it. 3 *Mod.* 289.

But in the principal Caſe the Court was of Opinion that Tolnetum might ſignify Stallage, and that it was a general Word to expreſs all Duties and Payments for the Conveniency of Paſſage, Stallage, Pickage, Cranage, &c.

As for inſtance, ſi. The Lord of a Manor preſcribed to have the 8th Part of one Buſhel of Corn brought into his ſaid Manor to be ſold; and this nomine Tolonii for Stallage, whether the Corn was ſold or not; and this was held good. 2 Rol. Abr. 123.

'Tis true, the Judges in that Caſe in *Moor* held, That Toll was payable of common Right only for live Cattle; but this ſeems contrary to the general Acceptation of the Word, for it ſignifies a Payment for any Goods or Cattle brought to Fairs or Markets to be ſold; the Reaſon is, becauſe all private Contracts were held unlawful, and therefore the Buyers of Goods in Markets were to pay Toll, in Teſtimony of the Contract there openly and publickly made; which Contracts were not confined to live Cattle only, but to all Manner of Corn and other Goods brought thither to be bought and ſold.

The Serjeant hath cited ſome Caſes to prove that what comes after the *viz.* in the principal Caſe is void and repugnant. *Aleyn* 23. *Hob.* 72.

What Uſe he makes of this I cannot well apprehend, unleſs 'tis that he takes it for granted that *Toll* cannot be due for *Stallage*, which is contrary to the Judgment of the Court; and if he takes it ſo, then the Defendant having preſcribed for reaſonable Toll, *viz.* a Shilling for *a large Stall*, thoſe Words muſt be rejected, becauſe *Toll* cannot be due for *Stallage*; and if thoſe Words are out of the Caſe, then the Preſcription is only for reaſonable Toll, and doth not ſay for what, and by Conſequence 'tis void for Incertainty.

2. It was objected that the Defendant had preſcribed for Toll inter alia for every large Stall, which is likewiſe incertain; for the Preſcription is entire, and therefore the Duty ought to be certain.

But this was not allowed; for he ought not to ſhew any more than the preſent Occaſion required.

3. It was objected that the Preſcription was incertain for another Reaſon, becauſe it was to pay a Shilling for a Stall, and for the Land near and round it.

This Objection was likewiſe diſallowed, becauſe 'tis according to common Uſage in Fairs and Markets.

Wilkes verſus *Kirby*.

Tempeſt. Paſ. 12 W. III. Rot. 529.

Norfolk, ſſ. TRESPASS for taking his Goods at Lynn Regis, &c.

The Defendant pleaded a Preſcription for the Owners of the Port to take Toll for Merchandize loaded there, and to be exported from thence by Foreigners not free of the Borough; and this was towards the neceſſary repairing the ſaid Port; and that they might diſtrain for Non-payment, &c.

And upon Demurrer it was objected, 1. That there ought to be a valuable Conſideration for this Toll, becauſe the Subject of common Right ought to have the Uſe of the ancient Ports, which are as free as the Highways; and therefore there ſhould be a Conſideration ſhewed why they muſt be reſtrained of that Liberty.

Roll's Abr. 265. So that in ſuch Caſes they ought to ſay that they are Owners of the Port, and have maintained the Key and Crane, or the like; and in Conſideration thereof have taken Toll of all Goods, *&c.*

Moor 574. *Cro. Eliz.* 710. So likewiſe for Toll for Cattle paſſing thro' a Village, 'tis requiſite to alledge that he hath repaired the Bridge, or Cauſeway, or the like.

Sid. 454. *and not* 154. Agreeable to this is the Opinion of my Lord *Hale*, who tells us 'tis *malum Tolnetum*, without ſhewing that the Party hath ſome Benefit from whom 'tis taken; as that he cleanſed the River, repaired the Banks, or hath done ſome other Thing as a Recompence for this Payment.

2. 'Tis true, here is a Conſideration alledged, but not as it ought to be; for 'tis only that Toll hath been taken erga reparationem, &c. when they ſhould have alledged in Fact that they had repaired the Port, and in Conſideration thereof had taken Toll.

Sid. 238. There are Caſes to prove that ſuch a poſitive Allegation is abſolutely neceſſary, and that 'tis ill without it: As for inſtance, A Cuſtom was alledged, That every Tenant of ſuch a Manor *haberet* a Way over ſuch a Place; this was naught; for it ſhould be *uſi fuerunt habere.*

The principal Caſe was not adjudged; but the Serjeant tells us, That Juſtice Powel held that the King might have a Port and take Toll without any Conſideration; and if a common Perſon hath a Port, he may be indicted for not repairing it; and that the Chief Juſtice Treby remembred the Caſe in 1 Mod. where it was held, That the Owner of a Port might have Toll by Preſcription, without alledging any Conſideration; but in this Caſe the Defendant had undertaken to ſhew that it was taken erga reparationem; which not being ſufficient, it may be a Queſtion whether it doth not make the Plea ill?

I 2

Hardall

Hardall verſus *Smith* and *Walkerly*.

Tempeſt. Trin. 12 W. III. Rot. 1789.

Lincoln, ſſ. TRESPASS, &c. for taking a Mare and converting her to his Uſe.

The Defendant juſtified by a Levari facias out of a Court-Baron, ſetting forth, That a Plaint was levied there, but did not ſay before whom, or in what County; and theſe were held to be Faults.

It ſhould have been thus: *ſſ. Quidam* T. P. *levavit querelam, &c. in Curia Baron' S.* W. *manerii ſui de* C. *in Com.* L. *coram* W. N. *Ar. Seneſcallo ejuſdem* W. *Curiæ ſuæ præd' verſus præfat'* R.

But then it was objected againſt the Declaration, viz. That Treſpaſs and Trover were joined together, which could not be; but this was diſallowed, becauſe the Converſion was only alledged by Way of Aggravation of the Damages.

There were two Caſes cited as to this Matter; one was an Action on the Caſe, for that the Plaintiff lent the Defendant a Horſe to ride from *London* to *Exeter*, and there to deliver it to the Plaintiff; which the Defendant ſo abuſed in riding, that it was of little Value, and that he refuſed to deliver it at *Exeter*, but *converted* it to his own Uſe. *Cro. Car.* 201

The other was likewiſe an Action on the Caſe againſt a common Carrier, for ſo negligently carrying the Plaintiff's Goods that they were loſt; and he declared likewiſe in Trover. *Sid.* 244.

Both theſe Declarations were held good, becauſe Not guilty is a Plea which goes to both Caſes; but 'tis to be obſerved that there were Verdicts in thoſe Caſes which cure many Faults, and that my Lord *Hobart* was of Opinion that the Defendant might have demurred to the firſt Declaration, becauſe it was double; which is this very Caſe.

Bird verſus *Dickinſon*.

Cooke. Trin. 12 W. III. Rot. 594.

Yorkſhire, ſſ. TRESPASS for breaking his Cloſe called the Fold in Barnesby, &c.

The Defendant pleaded in Bar, That Nathaniel Bower was ſeized in Fee of a Meſſuage in Barnesby; and ſo preſcribes for a Way from Weſtgate, &c. through the Fold, to a Court-Yard of the ſaid

ſaid Nathaniel Bower, called the Fold adjoining to his Houſe in Barnesby; that the ſaid Bower demiſed the Houſe to Dornford, to hold the ſame from the Day of the Date of the aforeſaid Indenture for 21 Years, and that the Way was ſtopped, &c.

And upon Demurrer to this Plea it was objected, 1. That 'tis not ſet forth in what Vill this Fold was; for tho' 'tis ſaid that it joined to the Houſe in Barnesby, that is not ſufficient, for it may ſtill be in another Vill, becauſe the Bounds of every Place properly terminate and adjoin to the Place which is next it.

2. The Juſtification is under a pretended Leaſe, habendum from the Day of the Date of the aforeſaid Leaſe, when there is no Leaſe mentioned before, for 'tis only that he demiſit, and doth not ſo much as ſay per Indenturam; but admitting it had been ſo, the Defendant ought to have ſet forth the Leaſe; but as he hath pleaded, it doth not appear that Dornford, the Leſſee, had any Manner of Right to diſtrain, &c.

There was no Book cited to prove either of theſe Exceptions; ſo the Plaintiff had Judgment.

Ford verſus *Edgcomb* & al'.

Tempeſt. Mich. 12 W. III. Rot. 659.

Devonſhire, ſſ. TRESPASS for taking a Hogſhead of Cyder.

The Defendants ven' & defend' vim & iniur' quando, &c. & dic' quod ipſe non debet to be compelled to anſwer, &c. and ſo plead in Abatement that the Plaintiff was outlawed.

And upon Demurrer it was objected that there was falſe Latin in the Plea; for there being two Defendants, it was ſaid that ipſe non debet, &c. And this was held a good Exception; the Plaintiff having demurred ſpecially, and ſhewed it for Cauſe, and that it had been naught even upon a General Demurrer.

The Serjeant hath added a *Nota* to this Caſe, in which he is once in the Right, *viz.* That here is a full Defence in a Plea in Abatement, which ought not to be; he made the ſame Obſervation where the like Plea was pleaded in * *Bar* to the Action, and yet in ſuch Caſe there muſt be a full Defence.

*Antea 486. *Clerke* verſus *Scroggs.*

Wallis verſus *Savill* & al'.

Winford. Trin. 13 W. III. Rot. 1506.

Yorkſhire, ſſ. THE Plaintiff declared for taking and detaining his Cattle until he paid 89 l. 10 s. for a Fine.

The Defendant pleaded in Bar, That one William Savill was ſeized in Fee of the Rectory of Mexborough, and that he demiſed Part of it to the Plaintiff for ſeven Years, &c. reddendum half yearly 77 l. 10. and ſo juſtifies the diſtraining ſome of the Cattle for Part of the Rent in Arrear, and ſome more Cattle for the Reſidue of the Rent; and upon Demurrer to this Plea, the Plaintiff had Judgment.

Becauſe he could not take two Diſtreſſes for one and the ſame Rent, he ought to have diſtrained as many Cattel at one Time as might ſatisfy the whole Rent; and if there had not been enough, then he ſhould have pleaded, That at the Time of the firſt Diſtreſs made, there were not Cattle enough on the Land, &c. and that it was made for ſo much, &c. Moor 7. Cro. Eliz. 13.

6 K Trover.

Trover.

Allen versus *Harris.*

Winford. Mich. 8 W. III. Rot. 325, vel. 326.

Kent, ff. TROVER for that he was poſſeſſed of a Waſtcoat which he loſt, and that bona & catalla præd' came to the Defendant, which he converted.

The Defendant confeſſed the Converſion, but pleaded in Bar, That in Conſideration he had promiſed to pay the Plaintiff 20 s. for the Waſtcoat, the Plaintiff had acquitted and diſcharged him from it; and upon Demurrer it was objected,

That the Defendant had not alledged that he did pay the 20 s. before the Action brought, for as 'tis pleaded, 'tis no more than giving one Action in the Room of another.

2 Jones 158, 168. To which it was anſwered, That where the Promiſes are mutual, and the Parties have mutual Remedies, there one Promiſe may be pleaded in Bar to an Action brought on the other; but then you muſt alledge Performance of that Promiſe, which is the conſtant Form in Pleading in ſuch Caſes.

Then an Exception was taken to the Declaration, viz. That the Plaintiff was poſſeſſed of a Waſtcoat, which he calls Bona ſua, and this cannot be when there is but one Thing mentioned before.

But it being upon a Special Demurrer, this was not allowed.

Waſte.

Leigh verſus *Leigh.*

Cooke. Hill. 3 W. & M. Rot. 1805.

Kent, ſt. IN Waſte the Writ is, that by the Statute, &c. it is provided, That it ſhall not be lawful to commit Waſte in the Houſes, Woods or Gardens; then he declares and makes a Title under a Common Recovery, and ſets forth, That Thomas Leigh was ſeized in Fee, and that by Leaſe and Releaſe the Lands were conveyed to P. G. and another, to make them Tenants to the Præcipe; that a Writ of Entry was proſecuted againſt them; and ſhews the Proceedings in the Common Recovery, and the Judgment, and the Writ of Seiſin and Return, and the Uſes thereof to the ſaid Thomas for Life, Remainder to the Defendant Eleonora Leigh for Life, Remainder to the Heirs Males of the Body of the ſaid Thomas, upon her Body to be begotten, Remainder to Truſtees for one hundred Years, &c. Remainder to the right Heirs of the ſaid Thomas for ever; that by Vertue thereof, the ſaid Thomas Leigh was ſeized for Life, &c. and alſo of the Reverſion in Fee, which he deviſed to Barton and Badby, and their Heirs, and died without Iſſue Male; that the Deviſees by Leaſe and Releaſe, conveyed the Reverſion to the Plaintiff and his Heirs; that the Plaintiff committed Waſte & deſtructionem in terris, by digging the Ground, &c. by ſuffering a Cottage and Barn to fall down, and by cutting down ſeveral Oaks growing ſparſim in a Wood called the Morrice, and alſo by cutting Fruit-Trees in two Gardens in Bromley, &c.

The Defendant pleads as to ſeveral Waſts mentioned in the Declaration, quod non fecit vaſtum; and the like Plea as to the Waſte alledged in Morrice-Wood, excepting the cutting twenty Oaks; and thereupon they were at Iſſue, and as to the cutting thoſe twenty Oaks ſhe pleads in Bar, that it was for Houſe-boot, Plough-boot, &c.

2

The

The Plaintiff replies as to the twenty Oaks quod fecit vaſtum, and traverſed that they were employed for Houſe-boot.

The Defendant rejoins, and took Iſſue as to the Oaks, that they were uſed for Houſe-boot, &c.

And the Cauſe coming to a Trial at Bar, the Counſel for the Defendant objected, That as to thoſe Waſts to which the Defendant had pleaded non fecit vaſtum, the Plaintiff in the Replication ought to have replied quod fecit vaſtum, without ſhewing a Title to thoſe Lands in which the Waſte was alledged to be done.

Becauſe non fecit vaſtum is the general Iſſue, by which nothing
Godb. 209. is admitted in Pleading, and therefore the Plaintiff muſt prove his Title to the Lands.

The Serjeant hath added a *Nota*, but it muſt be of Admiration, it cannot be of any Inſtruction to his Reader; 'tis a confuſed Rapſody of Matter, collected out of the Regiſter of my Lord *Brook*'s Abridgment, which he has tranſcribed *verbatim*, and which I muſt take ſeparately, and enlarge upon it, to make it in ſome Meaſure intelligible.

cap. 23. *ſſ.* That the Statute of *Marlbridge* ought to be recited in Writs brought for Waſte, except againſt Tenant in Dower, and againſt Guardian in Chivalry, becauſe an Action of Waſte did lie againſt them at Common Law, but not againſt Tenant for Life or Years, becauſe thoſe Eſtates were created by the Act of the Party; and it was accounted a Man's Folly or Negligence not to provide againſt Waſte; therefore this Statute providing a Remedy againſt ſuch Perſons, ought to be recited.

W. 1. *c.* 20. So it is upon the Statute *de malefactoribus in parcis*, which enacts, That great and large Damages ſhall be given againſt Treſpaſſers in *Parks*, according to the Manner of the Treſpaſs committed; all which are affirmative Words, and do not exclude the Common Law.

Now at Common Law, there was no more Damages given againſt a Treſpaſſer in a Park, than for a common and ordinary Treſpaſs, becauſe it was a Place encloſed more for the Pleaſure of the Owner, than for the publick Good; and Damages were never aſſeſſed according to the Value Men ſet upon their Sports, but according to the very Treſpaſs it ſelf; and therefore, ſince the Plaintiff might have a Remedy both at Common Law, and by the Statute, if he will have great Damages, it muſt appear that his Action is brought upon the Statute; and that cannot be without reciting it.

But it is quite otherwiſe where a Statute gives a remedial Writ, and preſcribes the Form of it; in ſuch Caſe there is no Occaſion of reciting the Statute, becauſe the Form of the Writ ſhews that it is brought on that Statute which created it, there being no ſuch Writ at Common Law before: As for Inſtance.

W. 2. *c.* 1. A *Formedon in deſcender* did not lie at Common Law, but it was given by the Statute *W.* 2. and the Form of the Writ is there ſet down. *ſſ. Præcipe A. quod reddat' B. &c.*

So

So where Tenant in Dower had loſt her Land by default, ſhe was without Remedy at Common Law, for ſhe could not have a Writ of Right, for that could not be had for a leſſer Eſtate then a Fee-ſimple, and ſhe had but an Eſtate for Life; therefore a *quod ei deforceat* is given by the Statute, and the Form of the Writ is preſcribed. *W.* 2. *cap.* 1.

By all which it appears, when a Man hath a Remedy at Common Law, and upon any Statute, if you will take Advantage of the Statute, you muſt recite it, that it may appear to the Court the Action is brought upon the Statute, unleſs where it preſcribes the Form of the Writ it ſelf, and then it need not be recited, for the Writ ſhews that it is brought on that very Statute.

If this be ſo, tho' ſince the Writ of Waſte in the principal Caſe, is brought againſt the Tenant for Life, there may be a Queſtion, Whether the Statute is well recited in that Writ? For it is, that it ſhall not be lawful for any one to commit Waſte in Houſes, Woods and Gardens, omitting the Word (Lands) which is in the Statute.

'Tis true, at the end of the Writ 'tis ſaid, That the Defendant committed Waſte in eiſdem tenementis, viz. in terris, by digging, &c. and there is an Authority in F. N. B. where it is ſaid, That if there is more or leſs in the Concluſion of a Writ of Waſte, than is in the Beguming, it ſhall not make the Writ void; and therefore though the Regiſter tells us, that the Word Exilium ought to be mentioned in the Recital; For 'tis, That Farmers ſhall not make Waſte, Sale or *Exile* of Houſes, Woods, or Men; where the Word *Exile*, as it relates to Houſes, ſignifies *Deſtruction*, and as it relates to *Men*, it ſignifies their Impoveriſhment by hard Uſage, or threatning them, ſo as they fly from their Habitation. Yet in Anno 15 Ed. 1. the Word Exile was omitted in the Recital, but it was mentioned in the Concluſion, and held good. F. N. B. 56. Fitz. Abr. 128.

The Serjeant hath added a *Quære*, Whether there was any manner of Occaſion of ſetting forth the Leaſe and Releaſe to make the Tenant to the Præcipe? becauſe the Defendant claiming under a Common Recovery, it ſhall be always intended that there was a good Tenant to the Præcipe, until it is ſhewn to the contrary; and ſo it was held at a Trial at Bar, between Griffin and Stanhope. 2 Cro. 453.

'Tis true, the Precedents do not warrant the Property, to plead That the Writ of Entry was brought againſt A. and B. tunc ten'tes liberi tenementi, without ſhewing Specially how they became Tenants, yet they may be intended good Tenants, till the contrary appears; and rather than a Common Recovery ſhall be deſtroyed, they ſhall be intended to be Tenants by Diſſeiſin, eſpecially if it is alledged that they are Tenants to the Freehold. 2 Mod. 70. 3 Rep. 58. *B.*

But the Serjeant is of Opinion, That there is no Inconvenience in ſuch ſhort Pleading, viz. That they are Tenants to the Freehold, without ſhewing how, for if it ſhould be denied, they may take Iſſue upon it; and ſo is Raſtal, *Tit.* Formedon 367. pl. 3.

There is another *Quære*, Whether a Recovery might not be pleaded in a ſhorter Way? *viz.* That *A.* and *B.* were Demandants in the Antea, *Hunloke* verſus *Petre* 305.

Writ of Entry, and *S.* and *G.* Tenants; that the ſaid Tenants vouched to warranty the Party himſelf, who was to ſuffer the Recovery, and he vouched the Common Vouchee; and thereupon *taliter proceſſum fuit*, that Judgment was given, That the Defendants ſhould recover againſt the Tenants, and that they ſhould recover of the Party *ad valentiam*, and he againſt the Common Vouchee; and not ſet forth as in this Caſe, the Writ of Entry at large, the Appearance of the Demandant, and the Count in the Recovery, and all the Proceedings at length, and the Writ of Seiſin and Return.

In Winch's Ent. 1128. 'tis pleaded as in this Caſe.

But in ſuch ſhort Pleadings, it is neceſſary to ſhew, that the Recovery is executed, either by Entry or Return of the Writ of Seiſin, for till then the Eſtate is not altered.

1 Jones 10. not in fol. 1. that is miſprinted.

There is another *Nota*, **That the Defendant had pleaded** quoad **the Waſte in** Little Tootes, nullum fecit vaſtum, **the like Plea** quoad **the Waſte in** Morrice-Wood, **when one Plea might have ſerved for the whole.**

2 Lev. 31. 10 Co. 1.

As thus, *quoad* the Waſte in *Little Toots* and *Morrice-Wood*, *nullum fecit vaſtum*, and ſo are the Precedents in the printed Books of Entry.

Co. Entr. 702. *Winch's Entr.* 1168.

And there is ſtill another *Nota*, **That to every Waſte which the Defendant juſtified he pleaded**, actio non, &c. **and concluded with** hoc parat' eſt verificare, **when one ſuch Plea and Concluſion might have well gone to the whole Juſtification.**

Ferrers verſus *Williams.*

Cooke. Trin. 9 W. III. Rot. 527.

Yorkſhire, ſſ. IN Waſte **the Plaintiff declared, That** William White **was ſeized in Fee**, &c. **and that he conveyed the Lands to** Sir Edward Barkham **and others, to the Uſe of himſelf for Ninety nine Years, if he ſhould ſo long live; then to** Sir Edward **and his Heirs, during the joint Lives of the ſaid** William **and** Frances **his Wife; then to the ſaid** Frances **for Life, Remainder to the Heirs of the Body of the ſaid** William **and** Frances **in Tail male; Remainder to the Right Heirs of the** Husband. **Provided, That if** William **ſhould die without Iſſue**, &c. **that then the Term for Ninety nine Years ſhould ceaſe; then he ſets forth, That** William White **died without Iſſue, That** Francis **entered, and that the** Reverſion **in Fee deſcended to the Plaintiff, as Couſin and Heir, viz. his Siſter's Son; and that the Defendant had committed Waſte, and aſſigned the particular Waſte.**

The Defendant pleaded in Abatement, and confeſſed the Death of White **without Iſſue**, &c. **and that the Plaintiff was his Heir** at

at Law, but ſaith, That White devised the Premiſſes to the Plaintiff in general Tail, viz. to him and the Heirs of his Body, with divers Remainders over, by Vertue whereof he was ſeized of a Reverſion in Tail, and traverſed that the Lands deſcended to him as Couſin and Heir; and upon Demurrer it was objected to this Plea,

ſſ. 1. That the Traverſe made it naught, becauſe the Plea had been good without it; for the Deſcent was ſufficiently avoided by the Deviſe, and ſo there was no Occaſion for the Traverſe.

But this Exception was not allowed, which occaſioned the Serjeant to obſerve, That it had been allowed formerly, even upon a general Demurrer as this was, but it was in the 21ſt Year of Queen *Eliz.* which was before the * Statute, which enacts, That after a Demurrer joined, the Judges ſhall proceed to give Judgment according to the Right of the Cauſe, and Matter in Law; without any Regard to Defects in the Proceeding, except ſuch *Defects as ſhall be expreſſed in the Demurrer.*

Dyer 366. a.

* 27 *Eliz. cap.* 5.

Therefore after this Statute, where-ever ſuch an Exception was taken, upon a Special Demurrer, and ſhewing it for Cauſe, the Plea was held ill.

2 *Cro.* 221. *Yel.* 151. idem. *Co. Ent.* 505.

2. The Judgment in the principal Caſe was, That Breve caſſetur, and afterwards a new Action was brought, and the Defendant pleaded nullum fecit vaſtum, and by Conſent of both Parties, he was to give any Special Matter in Evidence; and the Cauſe was to be tried at the Yorkſhire Aſſizes; but it was objected to ſtay the Trial, That none of the Jury had ſeen the Place waſted, and thereupon the Trial was ſtayed.

And this was the Occaſion of a farther Obſervation, *viz.* That by the Year-Book 9 *H.* 6. it appeareth, That if ſix of the Jury have not viewed every Place wherein the Waſte was aſſigned, they ſhall not be ſworn; and my Lord *Dyer*'s Opinion was, That if Waſte is aſſigned in ſeveral Places, and the Jury had not the View of ſome of thoſe Places, they may find that no Waſte was done.

9 *H.* 6. 65. *pl.* 21. *Noy* 5.

2 *Leon.*

In the Caſe of Sir *John Gage* and *Smith*, the Court agreed, That if ſix of the Jury are examined upon a *Voier dire*, Whether they have ſeen the Place waſted, it is ſufficient; ſo 'tis if they make Oath that they know the Place, although they did not view it all that Time.

But now by the Statute 4 & 5 *Annæ*, the Courts at *Weſtminſter* may order a Special *diſtringas* or *Habeas Corpus*, directed to the Sheriff, commanding him to take ſix out of the firſt twelve named in the Writ, and to have them to the Place before the Trial, and two Perſons to be appointed by the Court, and named in the Writ, ſhall ſhew them the Place; and the Sheriff by a Special Retorn upon the Writ, ſhall certify, that the View was taken according to the Command of the Writ.

Appendix.

Kemp verſus *Cruwes* & al'.

Hill. 7 W. III. Rot. 1684. C. B.

Devonſhire, ſſ. TRESPASS for breaking his Cloſe called the Broad-Cloſe, and taking three Cows, &c.

One of the Defendants pleads Not guilty to all, the other pleads Not guilty to the Force; and as to the taking the Cows, he pleads in Bar, That the Place where, &c. was called Buſhment-Meadow, and that the Defendant and one Thomas Mock were poſſeſſed thereof, &c. and that they aſſigned it to one Williams, reſerving Rent, and ſo juſtify the taking the Cattle in Buſhment-Meadow for Rent arrear.

The Plaintiff replied by Proteſtation that the Cattle were taken in Broad-Cloſe, and for Plea ſaith, That they were not Levant and Couchant on Buſhment-Meadow.

The Defendant rejoined that they were Levant and Couchant on Buſhment-Meadow; and upon this they were at Iſſue, and the Plaintiff had a Verdict.

Co.Lit. 47.B. And now it was moved in Behalf of the Defendant for a Repleader, becauſe the Iſſue was immaterial; for the Leſſor might diſtrain Beaſts for Rent, which eſcape into his Ground, tho' they were not Levant and Couchant upon the Land it ſelf.

But the Plaintiff moved for Judgment, and a Diſtinction was made between an ancient Rent due in reſpect of an old Tenure between the Lord and Tenant, and a Rent reſerved de novo, either upon a Grant or Leaſe; for in the firſt Caſe the Lord might diſtrain for the Arrears of ſuch Rent, tho' the Cattle were not Levant or Couchant, becauſe the Law favoureth the Antiquity of the Seigniory; but 'tis not ſo in the Caſe of a Rent reſerved upon a Leaſe for Years, for there no Diſtreſs can be taken till the Cattle are Levant and Couchant on the Lands.

3 Leon. 7. Dyer. 317, 318.

'Tis probable this Replication might be bad, if the Defendant had demurred to it; but having taken Iſſue upon the Levancy and Couchancy, and there being a Verdict for the Plaintiff, 'tis now cured by that Verdict.

The Defendant in his Rejoinder ought to have alledged that the Cattle were put into the Ground; for 'tis agreed, That if they escape there thro' the Fault of the Lessor or his Tenants in not making up the Fences, they are not to be distrained till they are Levant and Couchant.

None of the Books cited prove this Distinction; the Year-Books are mentioned in *Rolle's Abridgment*, and are thus: *ff.* If a Tenant is to enclose next the Highway, and in driving my Cattle they escape into his Ground, the Lord cannot distrain them for Rent. 22 *Ed.* 4. 49. 15 *H.* 7. 17. 1 *Rol. Abr.* 668. *pl.* 7.

In 2 Rol. Rep. there is a Case where the Plaintiff had Judgment after a Verdict upon an immaterial Issue, viz. It was in Trespass for taking his Boards; the Defendant pleaded, That the Plaintiff had so nailed them to the Defendant's House, that they obstructed his Light, &c. 2 Rol. Rep. 141. Gwyn *versus* Damport.

The Plaintiff replied, That he did not nail them to the House, and thereupon they were at Issue; and the Jury found that the Boards were nailed to the House, but not by the Plaintiff: Now tho' this was an impertinent Issue, for 'tis not material who nailed them; but then it ought to be avoided in the Pleading.

So in Trespass for taking his Horse, the Defendant justified by a Distress for Rent; the Plaintiff replied, That the Horse was not Levant and Couchant, and had a Verdict; and it was objected that this was an immaterial Issue, but it was not allowed. Colwell *versus* Milnes. Hill. 20 Car. 2. Rot. 1770.

One of the Judges held, That none of the old Books justify my * Lord Coke's Opinion in his Comment upon Littleton, but that the Distinction as to Levancy and Couchancy is thus, viz. Where the Cattle escape into a Ground without any Fault in the Owner, but merely by the Negligence of him who ought to make his Fences, and the Owner freshly pursues them, in such Case they shall not be distrained, because they are supposed to be always in his View and Possession; and they must be Levant and Couchant on the Land, before they can be lawfully distrained; but if the Owner voluntarily puts his Cattle into the Ground to commit a Trespass, or if he is bound to maintain the Fences between his Land and that next adjoining, and neglects to do it, and the Cattle escape thro' that bad Fence, then they may be distrained for Rent before they are Levant and Couchant, and tho' fresh Pursuit is made after them: And this seems to be warranted by the following Case, which is reported in † several Books. C. B. * Co. Lit. 47. B. † Reynolds *versus* Oakly. 1 Rol. Abr. 672. 1 Brown. 170. Hob. 265.

In an Avowry for Rent the Plaintiff pleaded in Bar, and conveyed a Title to himself to ten Acres adjoining to the Place where, *&c.* and that he put his Beasts into those ten Acres, and they escaped into the Ground charged with the Rent; that he freshly pursued them to drive them out, but before he came thither the Defendant had distrained them.

Brownlow and my Lord *Rolle* tell us, That the Distress was not lawful, because the Pursuit was fresh; and in such Case 'tis not to be supposed that the Cattle was *Levant and Couchant*.

Cro. Eliz. 550. And all that is said in *Cro. Eliz.* relating to this Matter is the Opinion of Justice *Walmsley*, who thus distinguished: *viz.* If a Man puts a Horse into a Stable of a private Man, 'tis distrainable for Rent, tho' not *Levant and Couchant*; but other Beasts shall not be distrained till *Levant*, &c. because the Owner cannot be presumed to know that they are there till they are some reasonable Time on the Ground.

7 H. 7. 1. 10 H. 7. 21. 'Tis true, there are two Cases in the Year Book of H. 7. where 'tis held, That if there is Lord and Tenant, and my Cattle escape into the Lands of the Tenant, that the Lord may distrain them for Rent before they are Levant and Couchant; but if this is Law, 'tis so only in the Case of a Lord Paramount, who hath nothing to do with the Land but to receive the Rent, and in the Case of a Grantee of a Rent Charge: But not where a Rent is reserved upon a Lease for Years, because the Lessor or his Tenant are bound to repair the Fences; and if my Cattle should escape into their Land thro' their Negligence, then they might take Advantage of their own Wrong; which is unreasonable.

2 Saund. 289. There was an Action of Trespass where the Defendant distrained for Rent arrear, upon a Lease for Years; the Plaintiff replied, That his Close adjoined to that of the Defendant, who was to repair the Fences, and for want of repairing them, his Cattle escaped into the Defendant's Ground, and were distrained before he could have any Notice they were there: 'Tis true, the Court held that Notice was not material, but it did not appear whether they were Levant or Couchant or not; however, it seem'd a very hard Judgment that the Lessor should distrain before he had Notice that his Cattle were on the Land, because they escaped there by his Negligence.

So that upon the whole Matter the Issue in the principal Case is not immaterial; for tho' there may be Instances where the Cattle of a third Person may be distrained for Rent, tho' not Levant and Couchant; yet when the Plaintiff had replied that they were not Levant and Couchant, &c. the Defendant should have shewed in his Rejoinder that they escaped into the Land, and set forth in what Manner, viz. By the Negligence of the Owner, and without any Default in himself; but having joined Issue upon the Levancy, &c. and it being found against him, it must now be intended that they came upon the Land for want of Fences, and without any Fault in the Plaintiff; so that they are not subject to a Distress before they were Levant and Couchant.

Bromwich versus *Lloyd.*

Cooke. Hill. 8 W. III.

London, ff. IN Trespass, the Plaintiff declared upon the Custom of Merchants in London, viz. in Parochia Beatæ Mariæ de arcubus, &c. That if any Person residing and trading there subscribed a Note for Money payable on Demand, he became chargeable to pay the same; that the Defendant signed a Note for 26 l. 10 s. payable to the Plaintiff, &c.

The Defendant pleads, That at the Time of the Note subscribed he was resident at Brentford in the County of Middlesex, and traversed that he did then reside and trade at London; and upon Demurrer it was objected in the Behalf of the Defendant, 1. That the Custom was not well alledged, because it was laid in London generally, and by the viz. it was restrained to St. Mary le Bow; but this Objection was not allowed, because it was necessary to name a Parish in respect of the Venue.

The Serjeant cites *Stukely*'s Case, without mentioning for what, but the Reader may find in that Case how nicely my Lord * *Hobart* argued upon that trifling Adverb *viz.* and first he tells us, That it can neither encrease or diminish; that 'tis not a substantive Clause of it self; and therefore a Sentence can neither begin or end with it; but that 'tis rather an Interpreter of a precedent Clause, and the natural and proper Use of it is to particularize that which was general before, or to explain what was doubtful; and that it may restrain where the former Words are not express and full, but so indifferent that they will admit of a Restriction without any apparent Injury to the Sense, which brings it something nearer to the Case at Bar; for the Custom was laid generally and expressly to be in *London*, and the *viz.* shall not be taken to restrain it, contrary to a plain and certain Allegation in the precedent Words.

* *Hob.* 168.

2. It was objected that the Plaintiff had not declared where the Note was made; now there are three Things which are the Foundation of this Action,

1. Commorancy.
2. Trading.
3. Making the Note.

And the last of these Things was wholly omitted.

But it was answered, That he had declared that the Defendant apud London, in the Parish aforesaid, residen' & commercium haben' fecit Notam, and where should that be but in London? For it must naturally be intended that it was all done at the same Time and Place, the Sentence it self being entire.

The

The Chief Juſtice Treby ſaid, That Bills of Exchange were originally between Foreigners and Merchants trading with the Engliſh; afterwards, when ſuch Bills came to be more frequent, then they were allowed between Merchants trading in England, and afterwards between any Traders whatſoever, and now between any Perſons whether trading or not; and therefore the Plaintiff need not alledge any Cuſtom, for now thoſe Bills were of that general Uſe that upon an Indebitatus aſſumpſit they may be given in Evidence upon the Trial, or it may be left to the Jury to determine whether it was given for Value received.

Shalmer verſus *Lady Poultney.*

Cooke. Hill. 8 W. III. Rot. 371.

Midd. ſſ. IN a Quod permittat proſternere quædam edificia, &c. the Plaintiff declared, That Sir William Poultney was ſeized in Fee of three Meſſuages with the Appurtenances in the Pariſh of St. Martin's in the Fields, &c. and of a void Space of Ground adjoining, &c. that there were eleven Windows conſtantly enjoyed in thoſe Meſſuages, and that the ſaid Sir William Poultney granted the Houſes to the Plaintiff's Father, with all Eaſements thereunto belonging; that the Premiſſes deſcended to the Plaintiff, and that one James Hulker, who was Tenant of the ſaid void Ground under the Defendant, levavit quædam edificia ſo near the Plaintiff's Houſe that they obſtructed his Lights; and tho' the Plaintiff had asked Leave of the Defendant, quod permittat illum proſternere eadem edificia, yet ſhe refuſed.

The Defendant pleaded in Abatement that the Writ was incertain, for that the Plaintiff had not ſhewed the Nature or Number of the Houſes new built; and upon Demurrer it was objected,

ſſ. That the Word quædam referred to no particular Number, and that the Word Edificia was very incertain, therefore becauſe the Judgment in a Quod permittat is, that the Nuſance ſhall be abated; the Particulars in the Writ ought to be expreſſed with the greateſt certainty imaginable; and it was for this Reaſon where the Plaintiff declared that the Defendant levavit quandam * molem, &c. the Writ abated, becauſe Moles is an improper Word for a Bay.

* Noy. 48. Cro. Eliz. 520. Moor 449.

'Tis true, the Caſe is ſo in *Noy*, but Serjeant *Moor* and *Croke*, who report the ſame Caſe, take no Manner of Notice that *Moles* was an improper Word for a Bay; they tell us, that an Action on the Caſe was brought for erecting *Molem ſuper & trans rivulum*, when it ſhould be an Aſſize, or a *Quod permittat*, for it ſeems the Wrong was done before the Poſſeſſion was transferred to the Plaintiff; and in ſuch Caſe he hath no Remedy at Common Law, and therefore the Statute gives a *Quod permittat*: But I would fain know what Word is proper for a Bay,

a Bay, if *Moles* is not? And why 'tis not as proper as *Agger* or *Pila*? Which are also equivocal Words; for the one signifies a Rampart or Bulwork, and the other a Prop or Buttress as well as a Bay; besides 'tis used by *Quintus Curtius* in this Sense, who certainly understood the Signification of the Word *Moles* as well as any Lawyer, if not better; *viz. Faciendæ Moles erat quæ Urbem continenti committeret.*

But I do not find the Court regarded this Objection; for they held the Writ was good, and that it doth not require so much Certainty as a Præcipe quod reddat, where the Land it self is to be recovered: Besides there are some Buildings which cannot be expressed by any other Word than Edificia; as for instance, the Monument in London; and in the old Natura Brevium there is a Writ for levying quandam Fabricam, which is as uncertain as quædam Edificia.

In F. N. B. 124 E. and not in 184. 'tis said, That a Quod permittat lies against the Tenant of the Freehold, for an Act done by another who was not Tenant of the Soil, which the Serjeant tells us is this very Case; but I think 'tis a Mistake; for 'tis true, the Lady *Poultney* was Tenant of the Freehold, and 'tis as true that *James Hulker*, who did the Nusance, was the Tenant of the Soil.

The Judgment was, That the Defendant should answer over.

And now the Serjeant comes in with his *Nota's* concerning a *Quod permittat.*

1. That tho' 'tis a Writ of Right in its Nature, yet a Tenant for Life may bring it against a Wrong-doer, for which he cites the Year-Book of *Ed.* 3. but there is nothing in that Page relating to this Purpose. 4 *Ed.* 3. 45.

But I think this is not worth any Man's Observation; 'tis true, At first a Writ of Right could not be brought by any Person but he who was Owner of the Inheritance; but this was afterwards extended to a Tenant in Dower, who hath an Estate only for Life; for a * Writ of Right of Dower is a Writ of Right Patent, and now Tenant in † Tail may likewise maintain this Writ. * *F. N. B.* 7 *E.* † 1 *Inst.* 326. *B.*

2. There was no Occasion for the Plaintiff to shew how he came by the Estate which Sir William Poultney formerly had in those Houses, which agrees with the first Resolution in ** Batten's Case, totidem verbis. ** 9 Rep. 53.

3. That the Statute W. 2. which gave the Writ Quod permittat against the Alienee of him by whom the Nusance was done, did not extend to the Alienee of such Alienee.

And to prove this *Batten's* Case is cited again; at the End of which Case 'tis said, That the Statute only extends to him that actually committed the Nusance, and to his Alienee; and some Year-Books are cited there to warrant that Opinion, which I have perused, and find that *Anno* 30 *Ed.* 3. 26. *B.* this was only the Opinion of a single Judge; and in the †† other Year-Book there is nothing relating to this Matter. †† 46 *Ed.* 3. 23, 24. 50 *Ed.* 3. 11.

Before I leave this Caſe I cannot but take Notice how incertainly the Caſe of *Beſwick* and *Cowden* is reported in our Books; Juſtice *Croke* tells us it was brought in the Queen's Bench, 35 *Eliz. Rot.* 493. and that the Queſtion was, Whether an Action on the Caſe would lie for a Plaintiff who was a Feoffee of the Land, for a Tort done in the Time of the Feeoffor, becauſe at Common Law an Aſſize of Nuſance did not lie againſt an Alienee of a Wrong-doer, for he was to take the Land in the ſame Condition that it was conveyed to him, and therefore the Remedy by a *Quod permittat* was given by the Statute of *W.* 2. by which he might recover Damages againſt the Feeoffor, if the Nuſance was not abated after Requeſt made for that Purpoſe?

Cro. Eliz. 402.

W. 2. *cap.*24.

But as this Caſe is firſt reported by Juſtice *Coke*, it was held, That an Action on the Caſe would lie, not for levying *quandam Molem*, but for *continuing* it, which is a new Wrong, and for that the Plaintiff ſhall recover Damages; and ſo it was held in * *Penruddock*'s Caſe.

* 5 *Rep.* 101.

Juſtice *Croke* reports the ſame Caſe again in the ſame Book, and there he tells us the Action was brought in *Trinity Term* 38 *Eliz. Rot.* 1038. which was three Years afterwards, and that Judgment was given for the Defendant, *viz.* That the Action did not lie, which was quite contrary to his former Report; and the Reaſon which he gave was, for that the Plaintiff might have a Remedy by an Aſſize of Nuſance, or by a *Quod permittat*; beſides it was, That the Defendant *cuſtodivit Molem, &c.* which might be before the Plaintiff had any Title to the Land; and did not ſhew that any Thing was actually done by him afterwards.

Fol. 520.

Serjeant *Moor* agrees with *Croke* in this laſt Report of the Caſe, but differs in the Term and Number-Roll, and they both differ from Mr. *Noy*; for he tells us that it was in *Eaſter Term* 19 *Eliz. Rot.* 15. and that it was a *Quod permittat*, when both the other ſay it was an Action on the Caſe.

Viz Paſ. 38 *Eliz. Rot.* 528.

Belaſyſe verſus *Heſter.*

Cooke. Trin. 9 W. III. Rot. 493.

Surrey, ſſ. THE Plaintiff being a Protonotary's Clerk, brought an Attachment of Privilege, for that the Defendant and one Greevſon were Perſons in via merchandizandi negotiantes, &c. and that the ſaid Greevſon drew a Bill of Exchange upon the Defendant for 10*l.* payable to the Plaintiff or his Order within ten Days after Sight; that the Bill was preſented on the ſeventh Day of May, and accepted by the Defendant, and that he promiſed to pay the Money; and then he lays an Indebitatus, &c. for ſo much Money received by the Defendant to the Plaintiff's Uſe.

The Defendant per Attornatum venit, and craved Oyer of the Writ, the Teſte whereof was on the ſeventeenth of the ſame May; and

and as to the first Promise he pleads, That the Writ was brought before the Plaintiff had any Cause of Action, unde petit Judicium de breve & narratione; and as to the Indebitatus, he pleads Non assumpsit; there was a Demurrer to this Plea, and a Joinder in Demurrer.

The Objections are reported in Disorder, which I will thus reduce; *ff.* First the Plaintiff had brought this Writ before he had any Cause of Action, for the Bill was to be paid in *ten Days after Sight*; and it being presented on the *seventh Day*, and the *Teste* of the Writ being on the *seventeenth Day of May*, there could not be ten Days *after Sight*, *&c.* unless you admit the Day on which it was presented to be one.

And as to that, it was agreed that the Day on which it was presented shall be taken inclusively, viz. for one of the ten Days.

There is a very nice Distinction in the third Resolution in *Clayton's* Case, which is also mentioned by my Lord *Coke* in his 1 *Inst.* 46. B. and 'tis thus: *ff.* If a Lease is dated 26 *Maii, habendum a die datus*, it shall commence on the 27th of *May*; for in such Case the Day of the Date is exclusive; but if it had been *habendum from henceforth*, then it shall commence from the *Delivery*, and not from the Date, because the Word *henceforth* can have no effect till 'tis a Deed, which is so from the Delivery, and not from the Date, and in such Case the Day of the Delivery shall be taken inclusively, and as Parcel of the Demise it self. 5 *Rep.* 1.

I have the first Edition of my Lord *Coke's* Reports, which were formerly the Books of Justice *Croke*, and noted with his own Hand, where at the end of *Clayton's* Case, he hath made this Observation, *viz.* That in *Michaelmas* Term, 4 *Jac.* it was adjudged contrary to that Case; though Serjeant *Towse* vouched it as an Authority in Point, in the Case then depending, which was between * *Osborne* and *Rider*, and it was thus: *ff.* A Lease was dated 1 *Januarii, Habendum a datu indenturæ præd'*, and in an Ejectment for the Lands, the Plaintiff declared upon a Demise made 1 *Jan.* which must be wrong according to *Clayton's* Case, because the Lease must commence on the Day after, *viz.* 2 *Jan.* but notwithstanding that Case the Plaintiff had Judgment; and there the Court distinguished between *a datu* and *a die datus*, which in *Clayton's* Case was held to be the same; for that *a datu* must be taken from the Time of the Delivery, but *a die datus* from the Time on which it was dated. * 2 *Cro.* 135.

And as a farther Argument, That the Day on which the Bill was presented, shall be taken inclusively, it was said, That the Law will not allow any Fraction of a Day, but in some particular Cases; as if a Man executes a Bond on the 18 Maii, and the Obligee seals a Release to the Obligor on the same Day; there if the Day should not be divided, the Bond would be discharged.

But in this Case, rather than there shall be a Fraction of the Day, it shall be intended that the Bill was shewed early in the Morning of the 7th Day.

And

Cro. Eliz. 168. And for this purpoſe there was a Caſe between *Smith* and *Hellier*, which was in Falſe Impriſonment; the Defendant juſtified, That on the 29th Day of *September*, he was choſe Mayor of *Lynn*, and that he committed the Plaintiff upon a Plaint levied againſt him, *&c.* It was objected, that he did not ſhew on what Time of the Day he was choſen Mayor; for 'tis probable that the Commitment might be before he was elected; and this Objection was much relied on, but the Court held, That the Juſtification ſhould go to the *whole Day*, and not to Part of it, and that if the Plaintiff was committed before the other Mayor, he ought to ſhew it.

Dyer 218. *pl.* 6. The next was a Caſe in *Dyer*, which I ſhall write at length, becauſe 'tis an extraordinary one.

27 *H.* 8. *cap.* 16. *ſſ.* By the Statute 7 *H.* 8. 'tis enacted, That Lands of Inheritance ſhall not paſs by a Deed of Bargain and Sale, unleſs 'tis enrolled *within ſix Months* after the Date; There was a Deed dated 4 *Octobris*, by which the Lands were conveyed in Fee; the ſame Perſon levied a Fine of the ſame Lands, on the 9th Day of the ſame Month, and declared the Uſes thereof to another in Fee.

The Bargain and Sale was enrolled on the 21 Day of *March* following, which according to the Computation of twenty eight Days in the Month, and not reckoning the Day of the Date to be one, was the very laſt Day of the *ſix Months*, ſo it could not be *within* the ſix Months; and if ſo, then he who purchaſed under the Fine, had the beſt Title; but it was adjudged otherwiſe, becauſe at Common Law, the Uſe of the Land was altered by the firſt Bargain, and the Poſſeſſion had been veſted accordingly, if it had not been for the Statute of Enrollments, which reſtrains this particular Conveyance to be enrolled *within ſix Months* after the Date, which was performed in this Caſe, becauſe the whole Day on which the Deed was dated, ſhall be accounted one of the twenty eight Days to make up the firſt Month; and it ſhall not be ſaid, That the laſt Month is expired before the one and twenty Days in *March* are quite ended: So that at any Time before that laſt Day is expired, the Deed may properly be ſaid to be enrolled *within* ſix Months: 'Tis true, my Lord *Dyer* tells us, this was a very narrow Pinch.

Then as to the Plea in Abatement, it was pleaded only quoad the firſt Promiſe, which ought not to be, becauſe in perſonal Actions the Writ is entire, and the Defendant cannot pray in the Concluſion of his Plea, that the Writ Caſſetur as to one Promiſe, for it muſt ſtand or fall to the whole.

And as to the ſecond Promiſe, the Defendant hath made no Defence, for he doth not ſay, That per attornatum venit & defend' vim & injuriam quando, &c. but only that he venit and craved Oyer of the Writ.

But this being only an Objection as to Form, the Court did not regard it.

The firſt was the principal Objection, viz. That the Writ was entire, and therefore the Defendant could not plead in Abatement to Part of it: As for Inſtance, ſuppoſe an Action of Debt is brought upon

upon a Bond, and the Defendant pleads a Releaſe in Bar to that Action; and the Plaintiff replies, & petit judicium, & damna ſua, omitting debitum, the Replication is ill.

The Defendant's Counſel perceiving the Court to encline for the Plaintiff, made ſome more Objections to the Declaration, viz. That the Plaintiff had ſet forth, That the Bill was made and accepted ſecundum uſum mercatorum; but 'tis not ſaid, that the Defendant became onerabilis to pay it ſecundum uſum mercatorum, neither is it averred when it ſhould be payable.

The Anſwer was, That upon a Demurrer to a Plea in Abatement, the Defects of the Declaration are not to be examined.

Then as to the firſt Objection, viz. That the Bill being made payable in ten Days after Sight, and it being preſented on the 7th Day of May, the Action ought not to be brought till after the 17th Day; but the Writ being Teſte on that very Day, the Plaintiff had not then any Cauſe of Action.

Now though it may be well known, that the Day on which the Bill is preſented, is excluſive of the Days in which 'tis payable after Sight; yet the Court cannot judicially take Notice of it, but it ought to be pleaded.

'Tis true, there may be ſome Caſes, where a Day may be taken to be inclusive: As for Example, where 'tis to preſerve a Right, or to prevent a Forfeiture, but never to ſupport an impertinent Action.

It was the Opinion of two Judges, That the Day on which the Bill was preſented, ſhall be accounted one of the ten Days poſt viſum, and that if 'tis the Cuſtom amongſt Merchants, that the Day ſhall be excluſive, it ought to be pleaded, for the Court cannot take Notice of that particular Cuſtom, as it doth of ſome other general Cuſtoms amongſt them, viz. That there is no Survivorſhip amongſt joint Merchants.

That if a Leaſe is made habendum a confectione, or from henceforth, the whole Day is included in which it was executed; that if a Bill is made payable a Day poſt viſum, that cannot be on the ſame Day on which it was preſented; but if 'tis payable within a Day after Sight, 'tis otherwiſe.

The Chief Juſtice Treby could not apprehend this Diſtinction; he agreed, That if a Bill is payable on a Day poſt viſum, it cannot be due on that Day in which it was preſented; becauſe it may be not produced till the very laſt Minute of that Day, and that as to this Purpoſe, a Day ſhall be accounted twenty four Hours.

That when Time is to be reckoned from an Act done, there the Day on which it was done ſhall be incluſive; as if a Robbery is alledged to be done on the 9th of May, 5 Annæ, and the Writ bears Teſte 9 Maii, 6 Annæ, there the Day on which it was committed, ſhall be incluſive in the Year; and becauſe there cannot be two nine Days of May in one Year, therefore the Writ ſhall abate; it being expreſly required by the * Statute of Hue and Cry, that it ſhall be brought within a Year after the Robbery committed. Hob. 139. * 27 Eliz.

But 'tis otherwise where Time is to be reckoned from Dates in Writings, for in such Cases, the Days on which they are dated, are generally exclusive of the Term.

But by the Opinion of the other two Judges, the Defendant was ruled to answer over; and as to the Plea of Non assumpsit, quod querens nil capiat per Breve.

The Serjeant hath improved this Case with some Observations of his own, and the first is, That it was my Lord Rolle's Opinion, That if a Man submits to an Award by a Bond dated 8 Maii, so as it be made in six Days after the Submission, in such Case, if the Award is made on the same Day, viz. on the 8th of May, 'tis good, because that Day shall be inclusive of the six.

Stiles 382.

Then he observed what the Chief Justice said in his Argument in the principal Case, *viz.* That he had spoke with the Judges of B. R. relating to this Plea, viz. That the Defendant had made no Defence, and they were of Opinion it was only a trifling Thing, and that if the Plaintiff had demurred Specially, and shewed it for Cause, yet the Plea had been good.

He observes farther, That one of the Judges was of Opinion, That an indebitatus assumpsit would not lie upon a Bill of Exchange, and to prove this, some Cases were cited.

The first was a Case in 1 *Mod.* 285. and that was governed by *Milton*'s Case in the Exchequer nine Years before, where it was argued thus against the Action, *viz.* That there was no Privity between the Acceptor of a Bill, who is a Defendant, and the Person to whom 'tis made payable, who is Plaintiff; and therefore there being no Contract between them, either in Fact or in Law, an Action of Debt will not lie.

Hardres 485.

On the other Side, to maintain the Action it was said, That 'tis a Rule in Law, That an Action of Debt will lie where the Common Law, or any particular Custom creates a Duty; and that this being a Duty created by the Custom of Merchants, therefore an Action of Debt would lie.

But my Lord Chief Baron *Hale* was of Opinion, That the Acceptance of the Bill did not create a Duty in the Acceptor, because the Drawer was still liable, and he is the Debtor notwithstanding such Acceptance; and that the Custom did not extend to create the Debt, but only made the Acceptor *onerabilis* to pay the Money if the Drawer did not pay it; and was no more than a collateral Engagement, or Promise to pay it if the Drawer did not; and so not like the Cases where Toll is due by Custom, or a certain Sum due to the Lord of a Manor, by a Custom for Pound-Breach, or a Fine upon Admittance to a Copyhold; for in all those Cases an Action of Debt will lie, because a Duty is created by Custom used in those Places.

1 *Vent.* 152.
1 *Lev.* 298.
idem.

And as a farther Proof of this Matter, the Serjeant cites his own Book in the Case of *Bromwich* and *Lloyd*, which was the very last but two before this; and there an *Indebitatus assumpsit* was brought upon a Bill of Exchange; and the Chief Justice was of Opinion, That such

Bills were now of general Uſe, and that they might be given in Evidence upon an *indebitatus aſſumpſit* at the Trial; but there it was brought againſt the *Drawer*, but in this Caſe againſt the *Acceptor*, which may make ſome Difference.

He farther obſerves, That in this Caſe there was not any Cuſtom of Merchants alledged, as it was in the Caſe of Bromwich and Lloyd; but only that the Plaintiff and one Greeveſon, were Perſons negotiantes in Merchandize, and that he ſecundum uſum mercatorum made the Bill.

I wonder the Serjeant ſhould make this Obſervation after he had cited *Hardres*'s Report, as above-mentioned; for if he had read that Caſe, he would have found that it was my Lord *Hale*'s Opinion, That to inſert the Cuſtom in the Declaration, would be merely ſuperfluous; now he mentioned this only to ſhew the Inadvertency of the Defendant's Counſel, in not obſerving this as well as he had done; but the Misfortune is, there is no Occaſion to inſert the Cuſtom of Merchants, *&c.* becauſe the Declaration is better without it.

Allen verſus *Bayley.*

Tempeſt. Hill. 9 W. III. Rot. 1833.

Worceſter, ſſ. IN Replevin, &c. the Defendant ſet forth, That he was ſeized, &c. in jure Uxoris, and ſo avowed the taking Damage Feſant, &c.

The Plaintiff replied, and diſclaimed any Title in the Place where, &c. but alledged that his Cattle entered againſt his Will, and did Damage, and that immediately after the Treſpaſs, &c. he tendered 5 s. in Amends, which he averred was ſufficient, and that the Defendant refuſed it; and upon Demurrer this Replication was held ill, becauſe the Tender was not alledged to be made before the Taking and Impounding, but immediately after the Treſpaſs, &c. which may be true, and yet not before the Impounding.

Now though by the Statute 21 Jac. 'tis enacted, That in all Actions of Treſpaſs quare clauſum fregit, wherein the Defendant ſhall in his Plea diſclaim any Title to the Land in quo, &c. and ſhall alledge that the Treſpaſs was involuntary; that in ſuch Caſe a tender of Amends at any Time before the Action brought ſhall be good; yet a Replevin is not within the Letter or Equity of that Statute, and therefore the Plaintiff ought to have averred expreſly, That the Tender was before the Impounding. 21 Jac. c. 16.

And ſo it was reſolved in * *Pilkington*'s Caſe, which was in Replevin, and the Avowry was for Damage Feſant, *viz.* That when a Diſtreſs * 5 *Rep.* 76.

Diſtreſs is taken in ſuch Caſe, the Plaintiff may tender Amends till the Cattle are *Impounded*, but afterwards 'tis too late, for then they are in the Cuſtody of the Law.

Het. 165. *Litt. Rep.* 355.

The Caſe of *Jennings* and *Couſins*, which is reported in *Hetley*, and the ſame again *totidem verbis*, in *Litt. Reports*, doth not come up to this Caſe, for the Tender is pleaded *after* the Taking, and before the *Delivery* of the Cattle; which Word *Delivery*, doth imply, that they were *Impounded*, for otherwiſe from whence ſhould they be delivered.

And it ſeems a Nicety in the principal Caſe, That the Tender might be taken to be after the *Impounding*, when 'tis expreſly alledged, that it was *immediate* after the Treſpaſs committed; which Word *immediate*, in Propriety of Speech, will admit of very little Time between the Treſpaſs and the Tender.

It was adjudged, That the Statute 21 Jac. did not extend to Replevins, but only to Actions of Treſpaſs, and that the Plaintiff ought to have alledged, That the Tender was before the Impounding.

† 8 *Rep.* 149. *Raſt. Entr.* 59, *B.* 373, *B.* 514, *B.* 521. *B.* *Co. Ent.* 182, *B.* 554. *B.* 1 *Saun.* 253.

And now the Serjeant comes with his *Nota's*, That the Avowry was not well pleaded, becauſe 'tis, That the *Husband only was ſeized*, when it ſhould be, that he and his Wife were ſeized *jure Uxoris*; and he tells us the Precedents are ſo, but he mentions none, and therefore I have done it in the † Margent.

Glover verſus *Barry*.

Cooke. Paſ. 10 W. III. Rot. 308.

London, ff. DEBT upon Bond for Performance of an Award. The Defendant pleaded an Award made, by which he was ordered to pay 50 l. to the Plaintiff, and that he ſhould make a publick Acknowledgment of his Offence, at ſuch Time and Place in London, as the Plaintiff himſelf ſhould appoint, &c. that he had paid the 50 l. and that the Plaintiff had not appointed any Place, &c.

The Plaintiff replied and confeſſed the Award as aforeſaid, and that the Defendant was to pay 50 l. for Coſts of Suit, which the Plaintiff had expended in proſecuting the Defendant for a Battery, &c. and to make a publick Acknowledgment as aforeſaid; and alſo, that upon Payment of the 50 l. they ſhould execute general and mutual Releaſes; and that he had appointed a Time and Place for the Defendant to make an Acknowledgment, of which he had Notice, and avers, That he had not paid the 50 l. and upon Demurrer it was objected,

That this was not a final Award, becauſe the Time and Place of making the Acknowledgment was referred to the Plaintiff himſelf,

ſelf; and it being a Truſt repoſed in the Arbitrators, to make a final End of the Controverſy, they could not refer any Part of it to the Plaintiff himſelf, or to any other Perſon.

But it was anſwered, That this was only a little Circumſtance, and no judicial Act, for the Subſtance of the Award was, That the Defendant ſhould pay the 50 l.

If an Award is, That the Party ſhall execute ſuch a Releaſe as Style 219.
Counſel ſhall adviſe, this is only a miniſterial Act, and doth not make the Award void; for there is no judicial Thing left to the Counſel, if it had, the Award would have been void; becauſe then the Arbitrators had delegated their Authority to another, which they could not do.

2. It was objected, That the Award was of one Side, for the Plaintiff was only to execute a Releaſe when the Defendant had made an Acknowledgment of his Offence, and that was not to be done till the Plaintiff had appointed both Time and Place, &c. which he was not obliged to do; and ſo by Conſequence the other was not obliged to ſign a Releaſe.

To which it was anſwered, That the 50 l. was to be paid in Satisfaction of the Coſts, &c. and by that Payment the Plaintiff had a Recompence for the Injury done, if ſo, the Defendant is diſcharged; and thus the Award becomes reciprocal.

3. It was farther objected, That the Replication was ill, becauſe the Defendant had alledged that he had paid the 50 l. which the Plaintiff now denied; ſo that he ought to have taken Iſſue upon this Affirmative and Negative.

It was anſwered, That if he had taken Iſſue upon the Non-payment, he had been catched as the Plaintiff was in * Veal and Warner's Caſe, which was thus: * 1 Saund. 323.

An Award was made, That the Defendant ſhould pay Money to the Plaintiff, and that both ſhould execute mutual Releaſes.

The Defendant acknowledged that an Award was made, and in pleading it, he ſets forth, That the Arbitrators awarded him to pay the Money, and to ſign a Releaſe, &c. but he did not ſet forth the other Part of the Award, by which the Plaintiff was likewiſe to ſeal a Releaſe, &c. then he averrs, That he had paid the Money, and ſigned a Releaſe.

The Plaintiff replied, and omitted likewiſe that Part of the Award which would have made it good, and tendered an Iſſue upon Non-payment of the Money.

The Defendant waived the Iſſue, and pleaded an ill Rejoinder, and upon Demurrer had Judgment; becauſe the Award as pleaded, was certainly naught, it being of one Side; ſo that it being void in it ſelf, though the Defendant had pleaded Performance, 'tis not material; becauſe it doth not ſignify whether a bad Award is performed or not.

The Plaintiff ſhould have ſet forth that Part of the Award which would have made it good, *viz.* That the Arbitrators had awarded him to give a Releaſe to the Defendant; and then aſſigned a Breach,

and tendered an Iſſue in Non-payment of the Money; but having done that firſt, he ſhall never afterwards allign any Thing to make the Award good; and ſo he was catched by the ill Pleading of the Defendant, *viz.* by his tendering an Iſſue before he had ſet the Matter in a clear Light.

4. Then it was objected, That the Plaintiff in his Replication, had acknowledged arbitrium præd', which muſt be the very Award as ſet forth by the Defendant in the Bar; and therefore muſt not alledge any new Matter as he hath done, becauſe that will be a Departure from what he ſaid before.

Which Objection was thus anſwered, viz. That the Plaintiff had not ſet forth another Award in his Replication, but had only ſhewed that Part of it which was omitted by the Defendant in his Plea.

The Court adjudged the Award and Replication to be good, but inclined, that Part of it, viz. the Appointment of the Place and Time of acknowledging the Offence, was not as it ought to be.

Powys, Executor of *Lloyd*, verſus *John Williams*.

Tempeſt. Mich. 10 W. III. Rot. 418.

London, ſſ. CASE by the Plaintiff, as Executor, &c. ſetting forth, That the Defendant 4 Julii, Anno 5 Regis, &c. was indebted to his Teſtator Bevis Lloyd in ſo much Money, received by the Defendant for his Uſe; then he declares upon an inſimul computaſſet, &c.

The Defendant by Proteſtation ſaith, That non aſſumpſit, and then pleads in Abatement, That the Defendant's Teſtator Bevis Lloyd was outlawed at the Suit of Edward Woodward; and avers the Identity of the Perſon; and upon Demurrer

The Chief Juſtice held, That the Debt was forfeited to the King; if ſo, the Attorney General might exhibit an Information for it, for 'tis a Debt executed, and though the outlawed Perſon is dead, yet the Outlawry ſtill remains in Force.

'Tis true, it might be otherwiſe in Things Executory, after the Death of the Perſon outlawed, and therefore he held that the Plea ſhould be in Bar, and not in Abatement.

But Juſtice Powell was of a different Opinion, viz. That the Defendant might plead it either in Abatement or in Bar.

The Serjeant obſerves, That in 11 *H.* 7. 11. *pl.* 27. 'tis held, that the Defendant might firſt plead in Abatement, and afterwards in Bar to a Debt; I have looked into that Year-Book, and there is not a Word in that Page relating to this Matter.

The next Case cited, is between * *Smith* and *Bernard*; 'tis reported by Justice Owen and Croke. ſſ. It was Debt on a Bond, the Defendant pleaded in Abatement, That the Plaintiff was outlawed; and it was held, That in such Case the Plea of Outlawry goeth in Bar to the Action; because the Debt is forfeited to the King; but 'tis not so in an Action of Debt upon a simple Contract. * Owen 22. Cro. Eliz. 203.

But the Law is now otherwise, for any Outlawry is a good Bar, as well to an assumpsit upon a quantum meruit, as to a Debt on a Bond; for the other is a Debt, though not reduced to a Certainty till the Thing is valued. 2 Vent. 282. 3 Lev. 29.

In the principal Case an Exception was taken to the Declaration, for that the Promise is alledged to be 5 Regis, when it should be Anno 5 Regis nunc & Mariæ nuper Reginæ; and for this Cause the Defendant had Judgment; though it was ruled in the Case of Bellasis and Hester, that upon a Demurrer to a Plea in Abatement, no Advantage could be taken of any Fault in the Declaration.

Scott versus *Charleton.*

Winford. Trin. 1 Annæ. Rot. 1180.

Northumberland, ſſ. AN Action on the Case was brought for so much Money, due to the Plaintiff for Barley, and the Declaration was upon an Indebitatus assumpsit, a quantum meruit, a mutuatus and an insimul computasset.

The Defendant pleaded, That the Causes of Action, nec earum aliqua, accrew'd within six Years.

The Plaintiff replied, That the Causes of Action, sive nonnulla earum, accrewed within six Years; & hoc petit quod inquiratur per patriam: And upon Demurrer he had Judgment, for it was a direct Affirmative of what was denied in the Bar, and therefore having tendered an Issue, the Defendant ought to have joined.

Walters

Walters versus *Hodges* & al'

Winford. Trin. 1 Annæ. Rot. 1290.

IN Replevin, the Defendants made Cognizance as Bailiffs to Robert More, for that Samuel More being seized in Fee of the Place where, &c. did by Indenture made between him and Richard More his eldest Son, upon his Marriage with Bridget Pennington, covenant to levy a Fine, &c. to make a Tenant to the Præcipe, in order to suffer a Common Recovery, &c. to the Use of the said Richard More and Bridget Pennington for their Lives, Remainder to their first, second and third Sons in Tail male, Remainder to Thomas More, and the Heirs Males of his Body, Remainder to Robert More, and the Heirs Males of his Body; Remainder to the Heirs of the Body of the said Richard More, upon the Body of Bridget to be begotten; Remainder to the Right Heirs of the said Richard for ever, with Power to make Leases for twenty one Years, or for any number of Years determinable upon three Lives, &c.

That the Marriage was had between the said Parties, the Fine levied, and the Recovery suffered.

That Richard More, Anno 8 W. demised the Lands to the Plaintiff Walters for Ninety nine Years, if he and the said Walters should so long live; under the yearly Rent of six Pound, payable half-yearly; that this Lease was pursuant to the Power in the Marriage-Settlement.

That Thomas More died without Issue, in the Life-time of Richard and Bridget.

That afterwards Richard More died without Issue, then Bridget died.

So that Robert More was seized of the Remainder, &c. and for 3 l. Rent arrear he took the Cattle.

The Plaintiff pleads in Bar to the Cognizance, and confessed the Seisin of Samuel More, but saith, That before he made that Settlement on his Son in Marriage, and before he levied that Fine, viz. 1 Novembris, Anno 1648. he made a Feoffment of the Land to his Brother Thomas More, to the Use of Robert More for Life, if the said Samuel should so long live; and if he should happen to die in the Life-time of the said Robert More, then to the Use of Richard More, and his Heirs during the Life of Robert.

That Samuel died leaving Robert, by Reason whereof Richard entered, and was seized in Fee, and being so seized, made a Lease to the Plaintiff Walters for Ninety Years, if he the said Richard and Walters, and two other Persons named in the Deed, should so long live, under the said yearly Rent.

That Walters entered by Vertue of the Lease, and the said Richard More, being seized of the Reversion, granted the same to Thomas More of Claynes, and to his Heirs; to which Grant the Plaintiff attorned.

That the Defendants de injuria sua propria took the Cattle; then he traversed that Samuel More was seised in Fee at the Time of the levying the Fine.

The Defendant replied, That Samuel More was seized in Fee at that Time, and thereupon they were at Issue, and the Plaintiff had a Verdict.

And it was moved in Arrest of Judgment that this was an immaterial Issue, and that the Right was not tried; for the Plaintiff had not answered the Cognizance as to the Fine levied by Richard More, who was estopped by it, and could not afterwards convey the Reversion to Thomas More of Claynes against his own Fine.

So that the Right to the Rent reserved was vested in Robert More, by Vertue of the Settlement in 1650; and it was not material whether Samuel More was seized in Fee, &c. at the Time of the Fine levied, because Richard More, who claimed under Samuel, had joined with him in a Fine, and by that Settlement had conveyed the Lands to Robert More and the Heirs males of his Body; so that the Seisin in Fee of Samuel is only formal, and to induce the Matter, and therefore not traversable; for which Reason it was insisted that the Verdict should be set aside, and a Repleader awarded to the Cognizance, which was ruled accordingly. 21 H.6. 14.a. per Newton.

The Serjeant hath delivered no particular Reasons given by the Court, but his own are as follow:

ſſ. Supposing a Seisin in Fee had not been alledged in Samuel More, it might be a Question, Whether the Cognizance is good? Because in pleading a Fine, 'tis usual to alledge that one of the Cognizors was seized, &c. and being so seized, levied the Fine.

'Tis true, my Lord Dyer tells us, That anciently the Course was otherwise, and that it was sufficient to say generally that quidam finis se levavit, because it might be of a Reversion, of which there cannot be any Seisin alledged.

And here the Serjeant hath transcribed almost half a Page out of *Dyer*, Word for Word, and hath made it difficult to be understood; and therefore I will explain it.

By the Statute * 1 *R.* 3. 'tis enacted, *That all Conveyances made by Cestui que use shall be good against him and his Heirs:* Now since this Statute Fines have been usually levied by *Cestui que use*, as effectually as if they had been levied of immediate Possessions and Seisins; and by the Statute † 32 *H.* 8. Fines which have been levied by Tenants in Tail of a Possession, Reversion, or Use, shall be a good Bar to the Entail.

* 1 *R.* 3. *cap.* 1.

† 32 *H.* 8. *cap.* 36.

Now by the Statute ** 4 *H.* 7. which tells us who shall be concluded by a Fine, there is a Saving to every Person not party or privy to the Fine, and that they may except to it, and plead to avoid it, That none of the Parties, *nor any to their Use*, had any Thing in the

** 4 *H.* 7. *cap.* 24.

Land at the Time of the Fine levied; and this proves that the ancient Form in pleading a Fine was thus, *viz. Quidam finis se levavit*, without alledging any Seisin in the Cognizors.

Now tho' the Words *seized to their Use* are added in this saving Clause, (but by the By that is a Mistake, for the Word *seized* is not in the Clause) yet anciently before the Statute it was sufficient to say, That *Partes ad finem nec earum aliquis nihil habuerunt.*

Rast. Ent. 380. B. **There are Precedents which shew that 'tis not necessary to alledge a Seisin in the Cognizor,** viz. In Rastal's Entries **twice** in the same Page.

10 *H.* 6. 21. *pl.* 71. The next Book cited is 10 *H.* 6. where Serjeant *Forteſcue* distinguished between a Fine *Sur Cognizance de droit come ceo, &c.* and a Fine *Sur Cognizance de droit tantum* with a Release; for in the first Case you need not alledge any Seisin in the Cognizor, because by that Fine he must be intended to be in Possession; but in pleading the other Fine you must alledge a Seisin in the Cognizor, because the Fine it self imports, That he had nothing in the Land at the Time it was levied.

3 H. 7. 9. a. **In** 3 H. 7. **'tis said, That if a Fine is pleaded, and the Party would avoid it by saying, That** partes finis nihil habuerunt, **the other need not reply and shew which of the Cognizors was seized; which implies, That he had not alledged it before; from whence it follows, That the Traverse and Issue taken upon the Seisin is immaterial, and a Repleader should be awarded.**

But admitting that the constant Form of Pleading had been to alledge a Seisin in one of the Cognizors, yet the particular Estate ought not to be traversed, because if either of the Cognizors hath any Estate, the Fine is good.

And to prove this, my Lord *Brook's Abridgment*, Tit. *Fines.* 109 is cited, but 'tis a Mistake; for there is nothing relating to it.

22 H. 6. 57. a. 33 H. 6. 21. pl. 20. 2 Inst. 522. 3 H. 7. 9. a. B. 12 Ed. 4. 13. **'Tis true, in** 22 H. 6. **the** Lord Chief Justice Newton **was of that Opinion; but when the Tenant pleads in Bar against a Fine** Sur Cognizance de droit, &c. **and alledges** quod partes finis nihil habuerunt; **the Demandant need not rejoin, and shew a Seisin in the Cognizors, because the Tenant himself ought to have pleaded further, and shewed who was seized, and so to conclude his Plea to the Country without any Rejoinder at all; for if the Demandant should rejoin, he might tender a false Issue,** viz. **he might say in the Affirmative** quod partes finis aliquid habuerunt; **which is very incertain.**

Admitting still that the Form of Pleading had been to alledge a Seisin in the Cognizor, yet there is no Authorities to warrant a Traverse of such Seisin, except 46 Ed. 3. 24. pl. 20. **and the Year-Books in the * Margent;** where the Reader may find that in Trespass the Defendant pleaded, That the Plaintiff's Ancestor, and whose Heir he is, levied a Fine *Sur Cognizance de droit, &c.* The Plaintiff replied, That at the Time of the Fine levied, and before, *&c.* he was seized of the Land, *absque hoc* that *partes finis aliquid habuerunt.*

* 8 H. 4. 7, 8. 3 H. 6. 27, 28. **Now if these Authorities are Law, then this is not the right Way of Pleading; but yet these Year-Books do shew that the pre-**

cise

rife Eſtate of Samuel More, one of the Cognizors, ought not to be traverſed, becauſe the Traverſe in thoſe Caſes was, That partes finis aliquid habuerunt.

Neither is there any Caſe to warrant the traverſing the Seiſin in Fee, alledged in the Cognizor in the principal Caſe, except that of Zouch and Bampfield.

This Caſe is reported in ſeveral Books, which are jumbled in a Manner ſcarce intelligible; but the Subſtance is thus, *More* 251. 1 *Leon* 77. 1 *And.* 165. *Savile* 84.

ſt. *Edward* Lord *Zouch* brought a *Formedon in deſcender* againſt *Richard Bampfield* for a Moiety of the Manor of *Molton*.

The Tenant pleaded, That *John* Lord *Zouch*, the Grandfather of the Demandant, was ſeized in Fee of the ſaid Manor, of which the ſaid Moiety was Parcel; and being ſo ſeized, levied a Fine thereof to *Ainſworth*, with a Render to the ſaid *John* in Fee, *&c.* whoſe Eſtate the ſaid *Bampfield* then had; and ſo *petit Judicium*, if the Demandant ſhould claim as Heir in Tail againſt the Fine of his Anceſtor.

The Demandant replied, That at the Time of the Fine levied *John* Lord *Zouch*, *&c.* was ſeized only of a Moiety of the ſaid Manor in Fee, and that one *Bampfield* (whoſe Heir the Tenant is) was ſeized of the other Moiety, and ſhewed how, but did not traverſe the Seiſin of the Cognizor, as alledged in the Bar; and upon Demurrer, this Replication was held ill, becauſe the averring that *Bampfield* was ſeized of a Moiety is not a direct Anſwer to that Seiſin alledged in the Cognizor, 'tis only argumentative, *viz.* *Bampfield* was ſeized, *ergo* the Cognizor was not.

'Tis true, it doth not ſeem to be conſiſtent that both ſhould be reſpectively ſeized of the ſame Thing at the ſame Time, no more than if one pleads that ſuch a Perſon is living, and the other replies that he is dead; but yet without a Traverſe ſuch Pleas are repugnant, becauſe there are two Affirmatives in them; upon which an Iſſue cannot properly be taken.

It was Juſtice *Rhodes* who excepted to that Replication, *viz.* That it was not good without a Traverſe of the Seiſin in the Cognizor; Serjeant *Moor*, who reports the Caſe, takes no Notice of the Exception, nor my Lord *Anderſon* himſelf, who was then Chief Juſtice of that Court where the Caſe was argued.

He tells us indeed that the Replication was ill, but doth not ſay for want of a Traverſe of the Seiſin in Fee in the Cognizor, but becauſe it was not a full Anſwer to the Bar; for it was no more than that *Bampfield*, at the Time of the Fine levied was ſeized in Fee; and he lays down this for a Rule, *viz.* That every Bar ought to be anſwered either by confeſſing and avoiding, or a Traverſe; and our Serjeant hath added ſomething to the Rule, (*viz.* or by Denial) and tells us, That *partes finis nihil habuerunt* had been a ſufficient Denial of the Seiſin alledged at the Time of the Fine levied, and that in Effect it was a Traverſe, tho' not introduced with the Formality of an *abſque hoc*, *&c.*

So that upon the whole Matter, the alledging a Seiſin in Fee is only a Formality to induce a Plea to a Fine; but 'tis not Matter of Subſtance to be traverſed; ſo Judgment was given againſt the Plaintiff.

Hayne verſus *Hilborne*.

Cooke. Hill. 1 Annæ, Rot. 302.

Somerſet, ſſ. DEBT upon Bond for Performance of an Award of Arbitrators, choſen by the Parties, Plaintiff and Defendant, and one Nathaniel Hilliard, to determine all Controverſies between them, or either of them, ſo as the ſaid Award be made before ſuch a Day.

The Defendant pleads Nullum arbitrium, &c.

The Plaintiff replied and ſhewed the Award made, and amongſt other Things, that they ſhould ſign General Releaſes, and aſſigned the Breach; and upon Demurrer,

It was objected that the Award was void; for by the Submiſſion it muſt be intended that there were ſome Differences between all three of the Parties; but Hilliard is not appointed to do any Thing.

Now if it may be intended that he was equally concerned with the Plaintiff Hayne, it may be a Queſtion whether he ſubmitted theſe Controverſies to the Judgment of the Arbitrators; but let that be as it will, the Award is void; for if Hilliard was equally concerned in Intereſt, and had not ſubmitted himſelf, &c. then it muſt neceſſarily be void, for want of a Power in the Arbitrators to make an Award as to him; but if he had ſubmitted himſelf, &c. it will alſo be void, becauſe he is not appointed to do any Thing, and yet he will take an Advantage of the Releaſe to the Defendant; for a Releaſe to one is a Releaſe to both.

* 1 Rol. Abr. 261. And for this Purpoſe the Caſe of * Harris and Painter was cited, where three of the one Part, and one of the other Part ſubmitted themſelves to an Award, ita quod, &c.

The Arbitrator made an Award only between two of them, and it was held void.

† 9 Rep. 98. 'Tis true † Baſpool's Caſe is againſt this Opinion, but it was not in Point of Judgment.

The Condition of that Bond was to ſtand to the Award of an Arbitrator, to determine *all Matters* between the Parties, *ita quod, &c.* and the Award was made, That the Defendant ſhould pay unto the Plaintiff a Sum of Money *in Conſideration* of a Promiſe to pay a Debt long ſince due; it was objected that the Award was void.

1. Becauſe it was of one Side.

2. Becauſe it did not appear that the Payment of the Money was the *only Matter* of Controverſy between the Parties.

To

To the first it was answered and resolved, that the Award was mutual, for one was to receive the Money; which Receipt would be a Discharge to the other of the Promise of the Debt.

And as to the other Exception, the Submission being general, *viz.* to determine *all Differences*, it may well consist with the Submission, if the Arbitrator determines only a single Controversy; but where the Submission is of several Special Matters, *ita quod* the Award be made *de Præmissis*, there the Award must be made of all, or 'tis void.

These were the Points in Judgment in that Case, and afterwards my Lord *Coke* adds these Words, which concern the present Case: *If.* And as it is of Things, so it is of Persons; for if two of the one Part, and one of the other Part, submit themselves to an Award, the Arbitrator may make it between one of the one Part, and the other, *&c.* and it shall be good.

But on the other Side it was argued that the Year Book * 2 R. 3. was an Authority in Point, which was thus: Three Persons on one Side, and one on the other Side, submit themselves to the Award of B. of all Matters between the Parties, &c. * 2 R. 3. 18. B.

B. may make an Award of all Things, which the three have against the other jointly, or of any particular Matter which either of them had against him; and that Case doth not differ from this, only there the Submission was not conditional with an ita quod, as 'tis in this.

But certainly those Words can make no Difference, because they only restrain the Arbitrator in Point of Time, but do not defeat him of that general Authority which he had to make an Award.

Now in the principal Case, the Submission was to stand to the Award of Arbitrators; what to do? Why, it was to determine all Controversies between the Parties, or either of them. If it had been for any of them, it could be no Question; and therefore lest a good Intention should be defeated, it may be so expounded; for certainly it was intended by all of them, that an effectual Award should be made between some of them, tho' it might not be between all.

The Case of Harris and Painter was not fully stated on the other Side; for in the Condition of that Bond it was recited, That there were several Controversies between the Parties, and the Submission was conditional; ita quod, &c. the Award be made between them: Now there was one left out, and there being nothing awarded as to him, therefore that Award was held void.

The Serjeant advises his Reader to look into the Case of Joyce and Anderson versus Haynes, where the Submission was by three ita quod, &c. the Award be made between the Parties, or any of them; there an Award made between two alone was held good, by Reason of those Words; but if there had not been any such Words in the Submission, then the Award must have been made between all. Hardres 399. Stile 471.

The Serjeant hath cited many Caſes to ſhew the proper Signification of theſe Words *either of them*.

2 *Rol. Abr.* 250. N°. 6. *If.* If two ſubmit to an Award ſo as it be made, *&c.* and delivered to *either of them*, there the Word *either* muſt be interpreted to both.

Cro. Eliz. 448. In another Place the Word *either* was expounded as if it had been every one of the Parties; but my Lord *Anderſon* doubted it, and well he might, for 'tis an Expoſition which inverts the Senſe of the Word.

My Lord *Rolle* tells us, That the *Latin* Word for *either* is *uterque*, which muſt be conſtrued both Parts; but certainly he had not conſulted the Grammarians, as the Judges did in * *Sheldon*'s Caſe; for if he had, they would have told him that *quilibet partium* is the proper Word for *either Party*.

*1 *Leon* 244.

'Tis true, *uterque & quilibet* are both Numerals, and are likewiſe both Partitives; but *uterque* never ſignifies *both together*; for if it did, I would fain know the Difference between that Word and *Ambo*; it properly ſignifies *Multa*, but it muſt be *ſingulatim*, and never at the ſame Time; and therefore it muſt be a very forced Conſtruction to make *uterque* and *ambo* ſignify the ſame Thing.

But tho' the Grammarians tell us that *uterque dividit*, and ſo it was always taken amongſt *Latin* Authors, as in *Virgil* and many more, *viz. in utrumque paratus*; which Words were ſpoken whether to live or die, for both cannot be done at the ſame Time; yet the Lawyers in † *Hungate*'s Caſe tell us it ſhall be taken both Ways, that is, jointly and ſeverally, according to the ſubject Matter, *ut evitetur abſurdum*.

† 5 *Rep.* 103. *Cro. Eliz.* 885. *Moor* 642. idem.

Cowell verſus *Devall*, Executor of *Kendall*.

Cooke. Trin. 2 Annæ, Rot. 1107.

Norfolk, ſſ. AN Attachment of Privilege was brought by an Attorney againſt the Defendant, as Executor of one Kendall, for Fees and Expences in ſeveral Suits in which he was employed by the ſaid Kendall.

The Defendant pleaded that the Teſtator Kendall was indebted to one Lombe, late high Sheriff of Norfolk in 300 l. on Bond, which was not ſatisfied; and that the Bond was ſtill in Force, and that he had fully adminiſtred, &c. and had not Aſſets ultra 10 l. to ſatisfy the ſame die exhibitionis Billæ, nor afterwards.

The Plaintiff replied that the Bond was given to Lombe, conditioned that the ſaid Kendall ſhould well and truly execute the Office of a Bailiff itinerant, &c. during the Time he ſhould be Sheriff, &c. and that he performed all Things in the ſaid Condition.

The Defendant demurred Specially, for that the Plaintiff did not alledge in his Replication, That the Bond was made upon no other Condition than what he had set forth; for Conditions in Bonds comprehend several Matters, and generally something in the Negative; therefore the Plaintiff ought to have shewed That what he alledged in the Replication, was the whole Condition of the Bond, or he should have set it forth in hæc verba, and have pleaded Specially to those Parts of it, which were in the Negative, if any such there were.

But this Exception was not allowed, because if there was any Thing more in the Condition, than what the Plaintiff had set forth, it should have been shewed on the other Side.

And to prove this, the third Resolution in * Meriell Tresham's Case was cited, which was thus. * 9 Rep. 110. 4.

If. In Debt against an Administratrix, she pleaded, That her Intestate entered into a Recognizance of 800 *l.* to *B.* to be paid at such a Day, *pro vero & justo debito.*

The Plaintiff replied, That the said Recognizance was acknowledged for securing the Re-payment of 400 *l.* only, which was paid and accepted in full Satisfaction of the said 800 *l.* and that it was kept on foot, and not cancelled, *per fraudem* of the Defendant; and upon Demurrer,

It was objected, That it was absurd to aver 800 *l.* was to secure the payment of 400 *l.* because it was contrary to the Recognizance it self, which is a Record.

Besides, if such general Pleading should be allowed, yet the Plaintiff ought to shew when the 400 *l.* was paid; but as he hath pleaded, it doth not appear whether the Money was paid at, or after the Day on which it ought to be paid.

Now the third Resolution in that Case is, That such general Pleading was good; for though the Payment was after the Day, yet the Cognizee having accepted a less Sum in Satisfaction of a greater, it was some Ground for the Plaintiff to aver that it was kept on foot by Fraud.

And thus the Plaintiff ought to have concluded his Replication, viz. That the Bond was kept on Foot by Fraud; and so are all the Precedents of Replications in such Cases. Co. Entr. 152.

But this Exception was not allowed, for the Plaintiff may either rely on that which he had pleaded and shewed to be a Fraud, or conclude his Replication as above-mentioned.

But then it was objected on the Behalf of the Plaintiff, that the Bar was ill, because the Defendant pleaded he had fully administred ante exhibitionem Billæ, when it should be ante impetrationem Brevis; and this was held to be an incurable Fault.

The Serjeant tells us he had this *ex relatione* of his Brother *Jennor*, who was of Counsel for the Defendant, and probably might draw this ill Bar; of which I shall take no farther Notice, only I cannot help upon this Occasion to reflect, that many Men, as well of the long Robe as others, are to their eternal Misfortune *crasso sub aere nati.*

Pearson

Pearson versus *Hulse.*

Cooke. Pas. 11 W. III. Rot. 308.

London, ss. INDEBITATUS assumpsit and a Quantum meruit was brought by the Plaintiff, by the Name of Dorcas Pearson.

The Defendant pleaded in Abatement, That after the Plaintiff had brought her Writ, &c. she was married to Henry Dotting, &c.

The Plaintiff replied, That post impetrationem Brevis, &c. she was not married, &c. and concluded to the Countrey.

The Defendant demurred Specially, and for Cause shewed, That the Plaintiff in her Replication, did not affirm that she was Sole, which she ought to have done, and then traverse that she took Dotting to be her Husband; and by this Means the Marriage would come in Question.

I find that the same Serjeant was of Counsel likewise for the Defendant in this Case; but certainly the Cause which is shewed in the Demurrer, is no more than a Quibble; for I would fain know, Whether the Matter in the Plea and Replication do not amount to an Affirmative and Negative, upon which a plain Issue may be joined? For one affirms that she was married, and the other saith she was not; therefore what Reason can be given why she should say that she was Sole, and traverse, that she married *Dotting*, and put the Defendant to rejoin that she was married? For is it not the same Thing whether the Issue be joined in the Replication or in the Rejoinder?

Aston Entr. 9. *Tho. Entr.* 424. *vel* *Entr.* 74. *a. Lat. Brownl.* 203, 204.

But the Serjeant tells us, He could not find in all his Books of Entries, but that the Issue in such Cases was taken in the Rejoinder upon the Traverse to the Replication; and probably it may be so, but 'tis not material whether the Issue be joined in the Replication or in the Rejoinder; and so was the Opinion of the Court in the principal Case.

Simpson versus *Garside.*

Trin. 2 Annæ, Rot. 1416.

Yorkshire, ss. DEBT upon Bond, dated 27 April, 2 Annæ, &c.

The Defendant craved Oyer of the Original, &c. the Teste whereof was 16 April, 2 Annæ, and then he pleaded, That the Writ was sued forth before the Date of the Bond.

The

The Plaintiff replied that it was another Writ on which he had declared, and sets it forth in hæc verba.

The Defendant rejoined and prayed Judgment, Whether the Plaintiff should be admitted to alledge another Writ than what was read to him, upon his craving Oyer thereof in his Plea, and upon Demurrer,

Three Judges were of Opinion, That the Replication was good, because the Writ being filed, it was the Act of the Court to have it read, and what was done by their Order and Appointment, shall never be prejudicial to him, or hinder him from shewing the true Writ.

This is not like the craving Oyer of a Deed, because that is always produced by the Plaintiff, and the Reading it is his own Act; and therefore in such Case he shall never be admitted to say, That it was not the Deed on which he had declared.

Upon this last Paragraph, the Serjeant hath made an Observation and a *Quære.*

He observes, That a Man cannot demand Oyer of a Deed at any other Time, but when 'tis in Court, which is during the whole Term in which it was produced; because in Supposition of Law, the whole Term is but one Day; so that the Court seems to have an equal Power to grant the Oyer of a Deed as of a Writ; and if so, then it may be a *Quære*, What Difference there is between the one and the other? 5 *Rep.* 74.

Certainly none, if 'tis admitted that both are the Acts of the Court; but 'tis not so, for the producing a Deed must be the Act of the Party, but the filing a Writ, and having it read, is the Act of the Court.

'Tis true, they have Power to grant *Oyer* of a Deed, but it must necessarily be the same on which the Plaintiff did declare; they may also grant *Oyer* of the Writ, but that may not be the same on which the Declaration is grounded, because there is frequently a Variance between the one and the other.

But as to the principal Point, Whether this Replication was good or not, there was one Judge who differed in Opinion from the rest, viz. That when a Defendant craves Oyer of a Writ, and 'tis read to him as the very Writ which is the Ground of the Action, 'tis then the Act of the Court; and when 'tis filed, 'tis then a Record, and the Plaintiff shall never afterwards be admitted to say, That 'tis not the true Writ; and so falsify the Act of the Court.

But admitting there should be any Mistake in the Writ, the Attorney for the Plaintiff might rectify it when the Paper Book is delivered to him, or he might apply to the Court for that Purpose.

The Serjeant hath made another Observation, *viz.* That there may be a Demurrer as well to the Writ for an apparent Fault in it after 'tis entered on Record, as there may be to a Declaration for any Va-

riance between it and the Deed upon which the Action was brought.

Plowd. 73. *Thel.* 383. There are ſome Caſes cited to prove this Matter, which was never yet doubted, but that the Defendant might demur in ſuch Caſe; therefore this Obſervation is not applicable to the principal Matter; for to make the Parallel, he ſhould have produced ſome Caſes where the Plaintiff had demurred for an Inſufficiency in his own Writ, or for a Variance between the Declaration and the Deed, and not where the Demurrer was on the Defendant's Side.

Acton verſus Biſhop of *Salisbury*, *Brown* the Patron, and *Sherwin* the Incumbent.

Trin. 2 Annæ.

Wiltſhire, ſſ. QUARE impedit to preſent to the Church of Collingborne Ducis, wherein the Plaintiff ſets forth, That Edward Seymour, Earl of Hertford, being ſeized in Fee of the Advowſon, made a Settlement of his Eſtate, and (inter alia) of this Advowſon to the Uſe of himſelf for Life, Remainder to Sir Edward Seymour, the eldeſt Son of the Lord Beauchamp for Life; Remainder to the firſt, ſecond and third Sons of the ſaid Sir Edward Seymour in Tail male, with like Limitations to Sir William Seymour in Tail male; with divers Remainders over, Remainder in Fee to the eldeſt Son of the ſaid Lord Beauchamp, who died without Iſſue male.

Then the Earl of Hertford died, and that the Honour deſcended upon Sir William Seymour, who was alſo Duke of Somerſet, who died 24 Octobris, 1660.

That William, the Nephew and Heir of the ſaid Duke William, viz. the Son of Henry, who was the only Son of the ſaid Duke William, and who died in the Life-time of his Father, being Tenant in Tail in Poſſeſſion, preſented Arthur Charlett, and afterwards died without Iſſue, in the Year 1671. That John, who was ſecond Son of Duke William, and Brother to Henry, being then Tenant in Tail in Poſſeſſion, ſuffered a Common Recovery, and declared the Uſes to himſelf and his Heirs; that he granted the next Preſentation to Elizabeth Oldfield, who granted it to Acton, &c. and that the Church being void by the Death of Charlett, it belonged to him to preſent.

The Biſhop pleads, That he claims nothing but as Ordinary, and Brown the Patron confeſſed, That the Earl of Hertford was ſeized in Fee of the Advowſon, and made the Settlement as aforeſaid; but that after the Death of Edward, the eldeſt Son of the Lord Beauchamp, the aforeſaid William Duke of Somerſet, and Henry

Henry his eldeſt Son, ſuffered a Recovery of the ſaid Advowſon, to the Uſe of himſelf and his Son for their joint Lives; Remainder to the ſaid Henry for Life, Remainder to ſeveral Perſons for Ninety nine Years, if one Mary Capell ſhould ſo long live.

That Henry Seymour died, and that Mary Capell being alive, the ſaid Duke William had preſented by Uſurpation, that Charlett the Preſentee, was inſtituted and inducted.

That Duke William died without Iſſue, and that the Advowſon deſcended upon Elizabeth his Siſter and Heir; who granted the next Preſentation to Sir Herbert Evans, under whom the Defendant derived his Title; and traverſed that the firſt Duke William was ſeized of an Eſtate Tail.

I cannot imagine why this Caſe is publiſhed, unleſs 'tis to make this ſecond Volume as large as the firſt, for the Serjeant tells us, It was never argued; and he doth not approve of the Declaration for a Precedent, becauſe it was ſo very prolix, and that a ſhorter way of Pleading had been better; for there was no manner of Occaſion to ſet forth all the Remainders at large; it had been ſufficient to alledge every Remainder thus, *viz. Remanere inde modo & formâ prout præantea limitat'* and this after the firſt Remainder.

Now if there was no Occaſion to expreſs thoſe Remainders at length, I would fain know what Occaſion there was (under the Title *Covenant*) to ſet forth long and uſeleſs Leaſes *in hæc verba?*

Had it not been ſufficient to ſhew only the Covenant on which the Breach was aſſigned, and no more; and not to have enlarged upon what did not relate to the Point in Queſtion? But it was a very ſeaſonable Obſervation in the very laſt Caſe but one of the ſecond Volume, to ſhew that the Declaration was very long; I do not doubt but the Serjeant had made the like Obſervation in many Places of the firſt, tho' it might not then be proper for his Purpoſe to acquaint us with it.

He likewiſe tells, that he and ſeveral more were Counſel for the Defendant, which is another Reaſon why nothing more is ſaid to this Caſe, and yet he hath mentioned no Reaſon before; but probably it might be that they were ſurpriſed at the Length of the Declaration, which I muſt confeſs not to be a very good Reaſon, but 'tis a worſe for a Lawyer to declare that nothing was ſaid in a Cauſe, becauſe he was of Counſel in it.

Routh & Ux' verſus *Weddell.*

Hill. 2 Annæ. Rot. 365. C. B.

DEBT upon Bond againſt an Attorney of the Common Pleas: The Plaintiff declared, That the Defendant conceſſiſſet ſe teneri, &c. omitting the Words per ſcriptum ſuum obligatorium.

The Defendant pleaded that he was an Attorney of the Common Pleas; and that there is a Cuſtom in that Court, That Attorneys, &c. ſhould not be compelled to anſwer, &c. unleſs per billam; and ſo

so pleads his Privilege to be sued per billam, and not by Original, unless he is forejudged.

The Plaintiff replied, That for five Years next before the Original filed, the Defendant had no Clients, but that he had withdrawn himself from the Office and Practice of an Attorney; and upon Demurrer it was objected,

That the Defendant had not alledged that he had any Clients, or that he prosecuted or defended any Suits at the Time of the Action brought; for that is the true Reason why he should be privileged, and therefore it ought to be alledged.

Rast. Ent. 469. B. pl. 1, 2, 3. 6, 8, 9.

So are the Precedents in Rastal, where Attorneys of the Common Pleas brought Habeas Corpus to discharge themselves from Arrest by Process out of inferiour Courts, and their Privilege is recited to be, dum aliqua negotia in eodem Banco prosequantur vel defendant; and 'tis agreeable to Reason that it should be so, for otherwise many Persons, who never intend to practice, would yet be made Attorneys on Purpose to entitle themselves to this Privilege.

But it was answered by the Court, That as long as the Defendant is an Attorney on Record, he ought to have the Privilege of an Attorney; and if he is not qualified to be an Attorney, the Court may be moved for a Rule to strike him out of the Roll.

2. It was objected that the Custom was alledged in fieri, and not in facto; for it was thus set forth, viz. That an Attorney should not be compelled to answer, omitting this Sentence, nec a tempore quo memoria hominum non existit compelli consuevit; so that there is no Usage in Fact alledged, which is always essential to make a Custom, and must be set forth in pleading it.

Moor 123. Cro. Eliz. 392. 1 Lev. 262.

But this Objection was not allowed, because the Court is able to take Notice of the Privilege of Attorneys in that Court, where they reside as Judges, and therefore a Custom in such Case ought not to be so strictly alledged as other Customs are; and so the Defendant had Judgment.

The Serjeant observes that the Words *per scriptum obligatorium* were omitted, and that it was not observed by any Body else; but he tells us, if it had, it would have been to no Purpose, because no Advantage could be taken of the Omission upon a General Demurrer; and I believe that was the very Reason why it was not mentioned either at the Bar or Bench.

There was the same Omission in Sir *William Courtney*'s Case, but there the Defendant craved *Oyer* of the Bond and Condition, which was read; and then he pleaded Payment, and it was found against him; and tho' it did not appear to the Court by the Pleadings that there were any Writings Obligatory; yet the Plaintiff having shewed a Writing by which he demanded the Debt, and the Defendant having admitted in his Plea that it was an Obligation with a Condition, it appeared to the Court that the Plaintiff in that Case had a just Debt, and a good Cause to recover it.

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FH
MVSEVM
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F I N I S.

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PAGE 363, Line 28, for 16 *d. ſſ. certa Leta*, read 16 *d. pro certa Leta.* p. 364, l. 24, for 2 *Leon.* r. 3 *Lev.* 365. p. 366, l. 10, for *deviſable*, r. *demiſable.* p. 369, l. 6, for *Leaſe*, r. *Releaſe.* p. 373, l. 44, for *Lord*, r *Law.* p. 386, l. 3, r. *the Rent is not determined.* p. 395, l. 36, for *unuſual*, r. *uſual.* p. 415, l. 1, r. *Canon*, for *Common Law.* p. 445, l. 32, for *Sci. fa.* r. *Fi. fa.* p. 465, l. 39, after *ſhould*, r. *not.* p. 469, l. 21, for *Traverſe*, r. *Treſpaſs.* p. 473, for *before*, r. *after.* p. 496, l. 15, after *Regiſter*, r. *out.* p. 497, l. 37, for *Property*, r. *Party.* p. 505, l. 17, for *againſt*, r. *for.* p. 508, l. 10, after *other*, r. *was.*